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IN THE

Supreme Court of the United States

CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORP., CYTEC INDUSTRIES, INC., G.E. BETZ, INC., ONDEO NALCO CO., STOCKHAUSEN, INC. AND ZINKAN ENTERPRISES, INC.,

Petitioners,

v.

WILLIAM K. STERN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the West Virginia courts violate due process when they subject defendants to "reverse bifurcated" trials, in which the jury determines the availability of punitive damages and a "punitive damages multiplier" before it has determined whether any defendant is even liable or whether any plaintiff is entitled to any relief.

PARTIES TO THE PROCEEDINGS

Petitioners are Chemtall Incorporated, Ciba Specialty Chemicals Corp., Cytec Industries, Inc., G.E. Betz, Inc., Ondeo Nalco Co., Stockhausen, Inc., and Zinkan Enterprises, Inc., who were defendants below.

Respondents are William K. Stern, Leonard A. Snyder, Michael Caputo, Terry Tucker, Michael E. Romada, Rodney Ferrell, Thomas Adkins II, and Jonathan Paul Spencer, Franklin Stump, Danny Gunnoe, and Teddy Joe Hoosier, each of whom is a plaintiff or intervenor in *Stern* v. *Chemtall Inc.*, Civil Action No. 03-C-49M in the Circuit Court of Marshall County, West Virginia; and the Honorable John T. Madden, Judge of the Circuit Court of Marshall County, who was the subject of the writ of prohibition proceedings below.

RULE 29.6 STATEMENT

Petitioner Chemtall Incorporated is a wholly owned subsidiary of SNF Holding Company, which is a wholly owned subsidiary of SPCM SA. No publicly held company owns 10% or more of SPCM SA's stock.

Petitioner Ciba Specialty Chemicals Corp. is now known as Ciba Corporation. Ciba Corporation (a Delaware corporation) is a wholly owned subsidiary of Ciba International Inc., a Swiss company, which is a wholly owned subsidiary of Ciba Holding Inc., also a Swiss company. Ciba Holding is a publicly held company. No publicly held corporation owns 10% or more of Ciba Holding's stock. In 1998, Ciba Specialty Chemicals Corporation acquired Allied Colloids, Inc, a corporation incorporated in the United Kingdom and a subsidiary of Allied Colloids, PLC. Allied Col-

loids, Inc. was subsequently merged into Ciba Specialty Chemicals Corporation.

Petitioner Cytec Industries, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock.

Petitioner G.E. Betz, Inc. is a wholly owned subsidiary of General Electric Company, a publicly held company. No publicly held company owns 10% or more of General Electric Company's stock.

Petitioner Ondeo Nalco Company is now known as Nalco Company. Nalco Company is a wholly owned subsidiary of Nalco Holdings, LLC, which is a wholly owned subsidiary of Nalco Finance Holdings, LLC, which is a wholly owned subsidiary of Nalco Holding Company, a publicly held company. No publicly held company owns 10% or more of Nalco Holding Company's stock.

Petitioner Stockhausen, Inc. is now known as Evonik Stockhausen, Inc. Evonik Stockhausen, Inc., a North Carolina corporation, is a wholly owned subsidiary of Evonik Degussa Corporation, a privately held German corporation. No publicly held company owns 10% or more of Evonik Degussa's stock.

Petitioner Zinkan Enterprises, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Chemtall Incorporated, Ciba Specialty Chemicals Corp., Cytec Industries, Inc., G.E. Betz, Inc., Ondeo Nalco Co., Stockhausen, Inc., Zinkan Enterprises, Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 655 S.E.2d 161, and is reproduced in the Petition Appendix ("Pet. App.") at 1a-24a. The opinion and order of the Circuit Court of Marshall County is unreported and is reproduced at Pet. App. 25a-53a.

JURISDICTION

On November 15, 2007, the Supreme Court of Appeals of West Virginia denied petitioners' request for a writ of prohibition. This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a). As this Court repeatedly has held, a "proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment" subject to review in this Court. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) (collecting cases); see *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Weston* v. *City Council*, 27 U.S. (2 Pet.) 449, 463-65 (1829) (Marshall, C.J.); see also *Bd. of Educ.* v. *Superior Court*, 448 U.S. 1343, 1345-46 (1980) (Rehnquist, J., denying stay application as Circuit Justice).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law ..." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In the decision below, the West Virginia courts once again blessed a "reverse bifurcated" trial process that is irreconcilable with this Court's precedents regarding constitutional limitations on punitive damages awards. The Case Management Order (CMO) entered by the trial court will subject numerous defendants (petitioners here) to a joint multi-phase trial in which the jury *first* will adjudicate whether punitive damages are "justif[ied]," Pet. App. 48a – and set a "punitive damages multiplier," *id.* – and only later determine whether any of the defendants is liable to any plaintiff, and whether any plaintiff sustained a legally cognizable injury.

This petition presents substantially the same issue as the petition currently pending in *Philip Morris USA Inc.* v. *Accord*, in which petitioners here filed an amicus brief supporting certiorari.[1] This petition should be granted (or at least held pending *Accord*) for the same reasons that compel review in *Accord*. By requiring the jury to adjudicate punitive damages before it determines whether any plaintiff is entitled to recovery against any particular defendant, under any particular set of facts or theory of liability, the

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[1] *See* Petition for a Writ of Certiorari, *Philip Morris USA Inc.* v. *Accord*, No. 07-806, __U.S.L.W. __ (U.S. Dec. 17, 2007) ("*Accord Petition*"); *see also* Br. *Amicus Curiae* of Ciba Corp. et al., No. 07-806 (U.S. Jan. 16, 2008)

CMO creates an "unreasonable and unnecessary risk," that the punitive-damages award will dèpend on conduct other than harm to a recovering plaintiff. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). Indeed, this process ensures that punitive damages will be "administered" in just the "imprecise manner" that due process forbids. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003). At the time the jury assesses punitive damages, there will have been no determination of liability or relief, and so the jury will not know how much additional punishment or deterrence is required (if any); much less will it be able to consider any ratio between actual and punitive damages, or how reprehensible the defendants' conduct may have been. In short, this standardless process guarantees precisely the "arbitrar[iness]" in assessing punitive damages that this Court repeatedly has held unconstitutional. *E.g.*, *Williams*, 127 S. Ct. at 1064; see also *State Farm*, 538 U.S. at 416-18.

Because the decision below does serious violence to due process, stands in clear conflict with the majority of courts that have considered similar procedures, and because such procedures are rarely reviewable after trial given the massive settlement pressures that they cause, the petition for a writ of certiorari should be granted.

1. In April 2003, plaintiff William Stern and seven other individuals filed a putative class action complaint sounding in strict liability and "medical monitoring" against petitioners. See generally Compl. (Pet. App. 54a-88a). They purported to represent broad classes of individuals (and their children) who worked in coal preparation plants across seven States and were exposed to "polyacrylamide flocculant with

residual acrylamide monomer." Pet. App. 55a (Compl., unnumbered paragraph).

Polyacrylamide is broadly recognized to be safe, and has been widely used for decades in a variety of industries. It is used to strengthen pulp in paper making, and in agriculture as a soil conditioner to promote water retention. It is used in consumer products, for example as an emollient in cosmetics and lotions. Polyacrylamide also is used to remove particles from wastewater and drinking water. The coal preparation plants at issue here use polyacrylamide flocculants to settle out sediment from coal wash water, so that the clarified water can be recycled and reused in the process.

Importantly – and notwithstanding the contrary implication inherent in the trial court's decision to confront the jury with punitive damages at the start – polyacrylamide is nontoxic, and respondents admit as much. Pet. App. 4a n.3. Polyacrylamides are produced by polymerizing acrylamide. In sufficiently high doses, acrylamide can be toxic. After manufacture, polyacrylamides may contain trace amounts of unpolymerized acrylamide – yet polyacrylamide has repeatedly and universally been found safe by regulatory agencies and other scientific groups worldwide. See, *e.g.*, Nat'l Instit. for Occupational Safety & Health, DHHS (NIOSH) Publ'n No. 91-115, *NIOH and NIOSH Basis for an Occupational Health Standard: Acrylamide: A Review of the Literature* 8 (1991) ("[p]olyacrylamide products are generally considered nontoxic"), *available at* http://www.cdc.gov/niosh/91-115.html. The level of acrylamide that may remain in the product after manufacture is, as here, vanishingly small – less than one tenth of one percent, and often much lower. Indeed, notwithstanding that polyacrylamide flocculants have been

used for decades in a variety of settings, until now they have been the subject of only a few individual cases.

Here, plaintiffs claim entitlement to monitoring based upon various alleged "increased risk[s]" of possible future harm, as well as "fear that serious health problems will develop" due to their alleged exposures. E.g., Compl. ¶¶ 27(a), (c), 100 (Pet. App. 61a, 83a-84a). Accordingly, the complaint seeks no compensatory damages. *Id.* ¶¶ 96-112 (Pet. App. 83a-86a). Instead, plaintiffs ask *only* for medical monitoring, *id.* ¶ 112 (Pet. App. 86a), and punitive damages, *id.* ¶¶ 113-114 (Pet. App. 86a).[2]

2. The trial court certified the class of workers spread across seven States that plaintiffs first sought but, in proceedings not directly relevant here, the West Virginia Supreme Court of Appeals vacated that order for failure adequately to evaluate choice of law. *State ex rel. Chemtall Inc.* v. *Madden*, 607 S.E.2d 772, 781 (W. Va. 2004). Following remand, respondents withdrew the class allegations related to purported exposures in five of the States, leaving the allegations arising under West Virginia and Pennsylvania law that are now at issue. *See* Pet. App. 26a.

After remand, the Circuit Court entered the CMO. Pet. App. 25a-53a. That order establishes a trial plan that is the reverse of any usual trial or how trials have been conducted for centuries. In Phase I of this "reverse bifurcated trial," the jury will determine

> (1) whether defendants' actions justify punitive damages, and if so, "what multiple of general

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[2] West Virginia is among just a few jurisdictions that allow a plaintiff to bring a claim for medical monitoring alone, without seeking recovery for any alleged injury *See Bower* v. *Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).

> damages will be assessed as a punitive damage multiplier as to each Defendant"; and
>
> (2) certain aspects of liability (such as product defect and warnings), but importantly, *not* causation.

Pet. App. 48a-49a. In Phase II, the jury will go on to consider a series of questions that should have been dealt with first, namely,

> (1) whether any plaintiff has proven "medical causation," which is necessary to liability[3];
>
> (2) whether any plaintiff's medical monitoring claim is viable; and
>
> (3) how costly court-overseen medical monitoring would be.

Id. at 49a. Only at some unspecified time after Phase I will the court determine whether the putative class may be certified. See *id.* at 48a-49a. In short, only *after* Phase I will actual liability to any plaintiff be determined.

3. Petitioners sought a writ of prohibition from the West Virginia Supreme Court of Appeals, arguing, among other things, that this form of reverse bifurcation violates the Due Process Clause of the United

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[3] The CMO at times suggests that the Phase I proceedings will determine liability, but this plainly is not correct. Pet. App. 48a (CMO); *see also id.* at 4a (opinion of Supreme Court of Appeals). Causation will not be decided until Phase II, *see id.* at 49a (CMO), and causation is a prerequisite for liability under well-settled West Virginia law. *See, e.g., Morningstar* v. *Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682, 684 (W. Va. 1979); *accord Wilkinson* v. *Duff*, 575 S.E.2d 335, 340 (W. Va. 2002) (per curiam); *see also* Pet. App. 19a (Benjamin, J., dissenting) ("Phase One ... excludes key components of liability, such as actual causation ....").

States Constitution. Pet. App. 90a-103a.[4] Specifically, petitioners argued that this procedure was unconstitutional under this Court's precedents, including *Philip Morris* v. *Williams*, because it "requires a jury to determine punitive damages without taking into account a plaintiff's individualized harm and prior to a finding of actual liability against any defendant." *Id.* at 10a (opinion below).

The Supreme Court of Appeals denied the writ. It concluded that the CMO "is not a clear error of law because it does not guarantee a result at odds with *Philip Morris* [v. *Williams*]." Pet. App. 10a. This ruling is consistent with the rulings of other West Virginia courts, which have repeatedly upheld reverse bifurcated proceedings. See *infra* at 24 & n.12.

Justice Benjamin dissented. He would have granted the petition because the CMO violates defendants' rights under the Due Process Clause. As he explained, the CMO "fails to ensure that any punitive damages award is reasonably related to any actual harm suffered by any plaintiff." Pet. App. 16a. It deprives the defendants of one of the fundamental requirements of due process – a "way to address individualized claims of particular plaintiffs, and demonstrate how their particularized exposures, if any, caused no increased risk of contracting a particular disease." *Id.*; see also *id.* at 18a ("petitioners are prevented from presenting every available defense, and from confronting and cross-examining adverse witnesses").

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[4] Defendants also challenged the trial court's order regarding intervention and the CMO's failure to address West Virginia and Pennsylvania conflicts of law. *See generally* Pet. App. 5a, 11a. Those rulings are not at issue here.

These constitutional violations, Justice Benjamin further explained, are heightened by the putative nature of the class:

> [B]ecause a class has not yet been certified, it is unconstitutional to require a procedure for determination of punitive damages and a punitive damages multiplier in a phase one trial that does not take into account only the harm to individual plaintiffs and does not determine liability as to any defendant.

Pet. App. 15a. After all, because the trial court decided to delay class certification, the "universe of plaintiffs" is uncertain, and petitioners "have no assurance as to whether additional individuals will be bound by the judgment." *Id.* at 18a-19a.[5]

Finally, Justice Benjamin stated that appellate review is required immediately. Permitting a case to proceed in this fashion places tremendous settlement pressure even on innocent defendants. Judicial "inaction" until after trial, he explained,

> constrains the effective choices realistically available to the petitioners to such a degree as to implicate grave due process considerations.... [W]e are acquiescing to a system whereby case management machinations and procedural chicanery rather than substantive law and facts ap-

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[5] Justice Benjamin additionally would have found that due process was violated insofar as this is "a medical-monitoring case, where the plaintiffs merely seek equitable, not compensable, relief." Pet. App. 15a; *see also id.* at 21a (stating that the CMO runs afoul of *State Farm* because "[a]ny award of punitive damages ... will be completely arbitrary because there are no actual compensatory damages on which to base a multiplier").

> pear to determine the outcome of the litigation. The right to defend yields to the need to settle.

Pet. App. 15a n.1.

REASONS FOR GRANTING THE PETITION

The "reverse bifurcated" trial plan approved below requires the jury to assess punitive damages in a vacuum, divorced from any individual plaintiff's case – much less a jury determination that any defendant is liable, or that any plaintiff is entitled to recovery. Such a procedure is patently unconstitutional. Just last Term, this Court "explicitly" held that "a jury may not punish [a defendant] for the harm caused others," and that any "procedure[] that creates an *unreasonable and unnecessary risk*" of doing so violates due process. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1063, 1065 (2007) (emphasis added). West Virginia's reverse bifurcation, however, guarantees that the punitive damages phase of the trial will cover the defendants' conduct writ large, divorced from any determination that any plaintiff actually was harmed. The risk is all the greater in this case, which is a *putative* class action in which the boundaries of the class have not been set, and the adequacy of the putative class representatives has not been determined. The risk created by this process is entirely "unnecessary" and "unreasonable," *id.* at 1065: There is *no* need to adopt this procedure because the trial could proceed in the traditional fashion – by considering liability (including whether medical monitoring is available), then assessing the availability and amount, if any, of punitive damages.

West Virginia's curious procedure runs further afoul of this Court's teaching that the Due Process Clause forbids arbitrariness in punitive damages awards. This Court repeatedly has held that juries

must be given appropriate guidance to prevent arbitrariness, and to ensure that punitive damages bear a meaningful relation to the twin purposes of punishment and deterrence. And, it has held that punitive damages may be imposed only after a defendant has had a full "opportunity to defend against the charge." *Id.* at 1063. By requiring the jury to assess punitive damages before it has assessed liability, however, the backwards West Virginia procedure is guaranteed to violate due process. The defendants will not have presented their defenses. And, arbitrariness is assured. The jury will not be able to assess punitive damages in light of compensatory awards because no such award will have been made. It cannot consider whether any incremental punishment or marginal deterrence is necessary beyond what the compensatory award already accomplishes. In rejecting historical practice in favor of what the West Virginia courts view as "'creative, innovative'" trial management, see *In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) (approving reverse bifurcation), the court has ensured that the requirements of the Due Process Clause cannot be met.

What is worse, this constitutional violation is no one-time mistake; it recurs in the West Virginia courts. Already pending before this Court is a petition for certiorari in *Philip Morris* v. *Accord*, in which the West Virginia Supreme Court of Appeals affirmed a substantially similar trial plan. See *Accord Petition*, *supra* note 1. West Virginia's highest court has made clear that it will continue to bless the reverse bifurcation of punitive damages, which it characterizes as "common" in the State's mass-tort actions, until it receives a "clear indication" from this Court that it is unconstitutional. *In re Tobacco Litig.*, 624 S.E.2d at 742.

West Virginia's approval of this procedure, however, exacerbates an existing conflict of authority over its constitutionality. The Second and Fifth Circuits and the Supreme Courts of Florida and Texas have held that reverse bifurcation of punitive damages violates due process. Indeed, only the Ninth Circuit joins West Virginia in approving the procedure. This Court should intervene to protect the due process rights of defendants in West Virginia, and to resolve the entrenched conflict between West Virginia and multiple other courts.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENTS.

A. Reverse Bifurcation Of Punitive Damages Creates An Unreasonable Risk Of Punishment For Harm To Others.

At the core of this Court's punitive damages jurisprudence is the fundamental principle that punitive damages must be assessed in light of harm that was done to the plaintiff. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003) (punitive damages are assessed for "the conduct that harmed the plaintiff"); *id.* (defendant's "conduct must have a nexus to the *specific harm* suffered *by the plaintiff*" (emphasis added)). This "fact-sensitive undertaking," *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001),[6] must focus upon the particular plaintiff's proof.

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[6] *See also Cooper Indus.*, 532 U.S. at 446 (Ginsburg, J., dissenting) (same); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality) ("[Punitive damage] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualita-

This principle was expressed recently and forcefully in this Court's "explicit[]" holding in *Williams* "that a jury may not punish for the harm caused others." 127 S. Ct. at 1065. This is required as a matter of fundamental procedural fairness: "[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example ... that the other victim was not entitled to damages." *Id.* at 1063. Indeed, the Court went on to explain, due process is violated when "state courts ... authorize procedures that create an *unreasonable and unnecessary risk*" of such a punishment. *Id.* at 1065 (emphasis added).

Williams makes clear that the process required by the CMO is flatly foreclosed by due process. *Williams* explained that imposing "punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many victims are there? How seriously were they injured? Under what circumstances did injury occur?" *Id.* at 1063. Those, however, are *precisely* the questions that the jury here cannot answer in Phase I of the trial plan. Because punitive damages will be evaluated before medical causation, and before individual liability, the jury's Phase I determinations will be based solely upon hypothetical harms suffered by putative class representatives. The jury will not know "[h]ow many victims" there were. It will not know "[h]ow seriously ... they [were] injured." It will not know "[u]nder what circumstances ... injury occur[red]." *Id.*

In short, this procedure ignores the constitutional requirement of a "nexus" between punitive damages

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tive assessment based on a host of facts and circumstances unique to the particular case before it.").

and the conduct that harmed the particular plaintiff. *State Farm*, 538 U.S. at 422. The trial plan would throw together decades' worth of claimed misconduct, allegedly undertaken by numerous defendants at different phases of manufacture and delivery, all to establish punitive damages multipliers applicable to plaintiffs who have established no right to recover (and who do not claim compensatory damages), and to the as-yet-unidentified class members who the putative class representatives purport to represent. It also seems to require the jury to select one single punitive damages "multiplier" per defendant, see CMO ¶ 1(k) (Pet. App. 49a) – regardless of any differences among plaintiffs or classes of plaintiffs, and no matter which of the numerous varieties of assertedly wrongful conduct any defendant might be found to have engaged in. *E.g.*, Compl. ¶¶ 87, 88, 97 (Pet. App. 80a-81a, 83a). In short, there will be no necessary correlation between the evidence presented at the punitive damages phase and the evidence that establishes liability, if any, to any recovering plaintiff.

This procedure will be further unhinged from any actual determination of liability because punitive damages will be adjudicated *before* the defendants have any opportunity to present their liability defenses. This runs afoul of the principle that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Williams*, 127 S. Ct. at 1063.

For all of these reasons, this procedure flies in the face of this Court's instruction that "[a] defendant should be punished *for the conduct that harmed the plaintiff*, not for being an unsavory individual or business." *State Farm*, 538 U.S. at 423 (emphasis

added); see also *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997) (Posner, C.J.) ("the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct"). Punitive damages must be based on "the facts and circumstances of the *defendant*'s conduct and the harm *to the plaintiff*." *State Farm*, 538 U.S. at 425 (emphasis added); see also *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 582 (1996) (punitive damage verdicts require fact-sensitive assessments). Here, instead, the defendants will be impermissibly punished for their generalized conduct toward unnamed, composite "'perfect plaintiff[s].'" *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (Wilkinson, C.J.).[7] This procedure is woefully insufficient to satisfy the constitutionally required "nexus" between a plaintiff's harm and the damages imposed. *State Farm*, 538 U.S. at 422.

These constitutional defects are exacerbated by the fact that no determination regarding class certification will come until after punitive damages already have been adjudicated. In the typical case, a court can appropriately limit evidence at the punitive damages phase so that it relates to the conduct that gave rise to liability, and to the plaintiffs who established liability – as this Court's precedents require. Here, however, the court during Phase I will not know what conduct (if any) may give rise to liability for which plaintiffs (if any) against which defendants (if any).

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[7] *See also Broussard*, 155 F.3d at 345 (warning of the unfairness inherent in trial procedures that allow plaintiffs to combine the most powerful aspects of unrelated claims so that the jury views plaintiffs "as a large, unified group that suffered a uniform, collective injury").

It therefore will be in no position to appropriately limit the evidence of punitive damages – which, under West Virginia law, broadly encompasses whether the allegedly wrongful acts were "'done maliciously, wantonly, mischievously or with criminal indifference to civil obligations.'"[8] These are precisely the circumstances under which due process concerns are at their height – when the jury receives "evidence that has little bearing as to the amount of punitive damages that should be awarded," *State Farm*, 538 U.S. at 418, or awards punitive damages based upon "its desire to punish the defendant for harming persons who are not before the court," *Williams*, 127 S. Ct. at 1060 (emphasis omitted).

B. Reverse Bifurcation Of Punitive Damages Ensures That The Jury Will Not Be Guided By The Constitutionally Necessary Standards.

Because "punitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994),[9] this Court has "emphasized the need to avoid an arbitrary determination of an award's amount." *Williams*, 127 S. Ct. at

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[8] Syl. Pt. 4, *Gen. Motors Acceptance Corp.* v. *D.C. Wrecker Serv.*, 647 S.E.2d 861, 863 (W. Va. 2007).

[9] *See also, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."); *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-10, 18 (1991) (expressing concern about punitive awards "'run wild,'" and that "'juries are left largely to themselves in making this important, and potentially devastating, decision [to impose punitive damages]'") (quoting, *inter alia*, *Browning-Ferris Indus.* v. *Kelco*, 492 U.S. 257, 280-82 (1989) (Brennan, J., concurring)); *Smith* v. *Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting) (punitive damage determinations "give[] free reign to the biases and prejudices of juries").

1062. To that end, "it is "particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." *Id.* at 1064. Specifically, "a State [must] insist[] upon proper standards that will *cabin the jury's discretionary authority.*" *Id.* at 1062 (emphasis added). The CMO ensures the opposite. It guarantees that the jury here will have unbridled and unguided discretion in setting punitive damages. Indeed, by requiring the jury to adjudicate punitive damages first, the CMO guarantees that the jury cannot meaningfully calibrate retribution and deterrence, and cannot take account of the guideposts established by this Court for administering punitive damages.

1. The Jury Will Be Unable To Meaningfully Calculate Punishment And Deterrence.

"Punitive damages ... are aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416 (citing cases); see *Bowyer* v. *HiLad, Inc.*, 609 S.E.2d 895, 910 (W. Va. 2004) (per curiam) (same). To calculate whether punitive damages are required, however, and in what amount, the jury must have *already* assessed liability and non-punitive relief, for the simple reason that those awards themselves punish and deter. See *Memphis County Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence ... operates through the mechanism of damages that are *compensatory*"); *Smith* v. *Wade*, 461 U.S. 30, 54 (1983); Syl., *Hess v. Marinari*, 94 S.E. 968, 968 (W. Va. 1918) ("[p]unitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant"). Thus, this Court held in *State Farm* that "punitive damages *should only be awarded* if the defendant's culpability, *after having paid compensatory damages*, is so reprehensi-

ble as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphasis added).

In direct conflict with this mandate, the CMO's reverse bifurcation of punitive damages means that the jury can make no such reasoned assessment. The jury will be unable to evaluate whether *additional* punishment and deterrence are necessary – and if so, how much – because it will not have calculated any underlying liability in the first place. Far from being "cabin[ed]," punitive damages will be assessed in a vacuum. This is the antithesis of what due process requires.

2. The Jury Will Not Be Able To Take Account Of The Constitutional Guideposts.

For similar reasons, the CMO ensures that the jury's determination of punitive damages will be unhinged from the guideposts this Court has established for limiting the arbitrariness of punitive damages awards – specifically, reprehensibility, and the ratio between compensatory and punitive damages.

Punitive damages must be assessed in light of the "reprehensibility" of the defendant's conduct. *BMW*, 517 U.S. at 575-76; see *State Farm*, 538 U.S. at 419. Reprehensibility, of course, turns in large part on who the defendant harmed, if anyone, and to what extent. See *BMW*, 517 U.S. at 575-76 & nn.23-24. But reverse bifurcation requires the jury to assess punitive damages *before* it has adjudicated these predicate questions.

Likewise, the jury's discretion will not be cabined by any consideration of the ratio or relationship between compensatory relief and punitive damages. See *id.* at 580-81. Due process requires "that the

measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *State Farm*, 538 U.S. at 426. Only by considering punitive damages in light of the relief already awarded can the jury make sure that the "punishment . . . fit[s] the crime." *BMW*, 517 U.S. at 576 n.24. For instance, this Court has explained, where the amount of compensatory damages awarded in the first instance is very low, "a particularly egregious act" might trigger a higher ratio without violating the Constitution, but where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; see also *Bowyer*, 609 S.E.2d at 910.

But that calculation is impossible here for the reason discussed above. Even assuming that the medical monitoring sought here could operate as the numerator for purposes of evaluating the ratio, which petitioners by no means concede, see *supra* note 5, the jury will calculate punitive damages before it has assessed any liability that could form the basis for the requisite analysis. See *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246, 1262 (Fla. 2006) (per curiam) ("there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed"), *cert denied*, 128 S. Ct. 96 (2007); cf. *EEOC* v. *W&O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000) ("[b]efore comparing the punitive damages to the actual damages, we must first determine what the 'actual damages' were"). Indeed, the very decision to structure the jury's inquiry in this fashion is likely to insinuate that such punishment is required, and to push the jury to a finding of liability.

These concerns are all the greater – and the conflict between the CMO and this Court's precedents all the starker – because Plaintiffs seek redress for no actual, current injury. Instead, they base their claim only upon "increased risk[s]" of certain purported future harms, and "fear" arising therefrom, and they ask the court to create "an independently supervised medical monitoring program, funded by the Defendants." Compl. ¶¶ 27(a), 100, 112 (Pet. App. 61a, 84a, 86a). This Court has recognized, however, that medical monitoring creates a threat of "'unlimited and unpredictable liability.'" *Metro-N. Commuter R.R.* v. *Buckley*, 521 U.S. 424, 435-36 (1997); *id.* at 442 (such claims present "uncertainty as to the amount of liability"). And experience has borne this out.[10] In short, the CMO would have the jury assess punitive damages in a vacuum, with no consideration of whether there was any legal harm to any actual plaintiff – in a case where the claim alleged requires no finding of present physical injury, and under circumstances where this Court has warned of the dangers of vast and uncertain primary liability. This Court's precedents dictate that punitive damages must reflect the "'enormity'" of the defendant's offense, *BMW*, 517 U.S. at 575, and that is simply impossible under the CMO.

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[10] *See, e.g.*, Lewis F. Powell III, *Class Settlement of Mass Tort Claims*, 7 Sedona Conf. J. 259, 263 (2006) (discussing $1 billion medical monitoring fund); *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 287 n.36 (N.D. Ohio 2007) (discussing a putative class numbering in the tens of thousands which requested medical monitoring totaling $200 million per year); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 994 (S.D. Ohio 2001) (discussing summary jury award of $265 million for medical monitoring costs).

II. THE DECISION BELOW WIDENS AN EXISTING CONFLICT OVER THE CONSTITUTIONALITY OF REVERSE BIFURCATION OF PUNITIVE DAMAGES.

This Court's review is further warranted because the decision of West Virginia's Supreme Court of Appeals exacerbates a mature, existing conflict regarding the constitutionality of trying punitive damages prior to determining liability and underlying relief.

1. The majority rule – reflected in the decisions of two federal courts of appeals and two state courts of last resort – is that the procedure repeatedly approved in West Virginia is unconstitutional.

Two courts of appeals have rejected the reasoning of the court below. Most recently, in *In re Simon II Litigation*, the Second Circuit held that the defendants' due process rights were violated by a class action trial plan that sought "an assessment of punitive damages prior to an actual determination and award of compensatory damages." 407 F.3d 125, 138 (2d Cir. 2005), *rev'g* 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.). Applying *State Farm*, it concluded that the trial plan "fail[s] to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms." *Id.* Simply put: "*State Farm* made clear that conduct relevant to the reprehensibility analysis must have a nexus to the specific harm suffered by the plaintiff, and that it could not be independent of or dissimilar to the conduct that harms the plaintiff." *Id.* at 139.

The Fifth Circuit has held likewise. In *Allison* v. *Citgo Petroleum Corp.*, plaintiffs appealed the district court's denial of class certification, which followed the

district court's rejection of a bifurcated trial plan in which actual liability to individual class members would not be determined until the trial's second phase. 151 F.3d 402, 417-19 (5th Cir. 1998). The Fifth Circuit held this plan unconstitutional. Directly contrary to the reasoning of West Virginia's highest court, it held that "punitive damages must be determined *after proof of liability to individual plaintiffs* ... not upon the mere finding of general liability to the class." *Id.* at 418. This is so "because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs." *Id.* at 417. Accordingly, "recovery of punitive damages must necessarily turn on the recovery of compensatory damages." *Id.* at 418.

In addition, two state supreme courts have rejected the reverse bifurcation of punitive damages. The Florida Supreme Court recently reversed a $145 billion punitive damages award following a reverse bifurcated class action trial. *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert denied*, 128 S. Ct. 96 (2007). The court held that federal due process is violated when "the trial court ... allow[s] the jury to consider entitlement to punitive damages before the jury found that the plaintiffs had established causation." *Id.* at 1263. Moreover, the court concluded that – contrary to what the CMO will require – "the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages." *Id.* at 1265; *id.* at 1262-63.[11]

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[11] At the same time, a separate majority held that the bare *entitlement* to punitive damages may be assessed before entitlement to compensatory damages. *Engle*, 945 So. 2d at 1262.

The Texas Supreme Court has held likewise. It evaluated a reverse bifurcated proceeding in a class action, in which the jury was required to assess punitive damages for the entire class before evaluating "the extent of compensatory damages, if any, for each of the ... plaintiffs," and determined that this violated due process. *S.W. Ref. Co.* v. *Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). The court explained that such reverse bifurcation "fails to ensure that punitive damages have some understandable relationship to compensatory damages and are not grossly out of proportion to the severity of the offense for each of the ... plaintiffs." *Id.*

2. On the other side of the ledger, the West Virginia courts are joined only by the Ninth Circuit.

In *Hilao* v. *Estate of Marcos*, the Ninth Circuit considered the constitutionality of a reverse bifurcated class action trial. 103 F.3d 767, 772 (9th Cir. 1996). As here, the court rejected the argument that the trial violated the defendant's "rights under the Due Process Clause by holding the exemplary-damage phase of the trial before the compensatory-damage phase." *Id.* at 780. The court concluded that there is no constitutional defect in trying punitive damages first, on the theory that the "excessiveness of a punitive-damage award is measured in part by the reasonableness of the relationship between the award and '*the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *Id.* at 781. In short, the court reasoned that because the jury does not specifically adjudicate future harm, there is no need to adjudicate compensatory damages before punitive damages. The Ninth

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This confusion further illustrates the need for this Court's review.

Circuit has reaffirmed *Hilao* even after *State Farm* and *Williams*. See *White* v. *Ford Motor Co.*, 500 F.3d 963, 973 (9th Cir. 2007).

The fact that the reverse bifurcation of punitive damages is a very recent development, approved by just the Ninth Circuit and by the West Virginia courts, is a strong reason to be suspicious. See *Oberg*, 512 U.S. at 430 ("traditional practice" is a "touchstone" of due process); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring in judgment) (the Constitution requires "that due process (*i.e.*, traditional procedure) has been observed" in imposing punitive damages). Review is warranted to resolve the conflict between these two jurisdictions and the strong majority that have rejected this anomalous process.

III. REVIEW IS WARRANTED NOW AND IN THIS CASE.

The issue presented by this petition is ripe for review, and interests of fairness and judicial economy militate in favor of doing so immediately.

First, the CMO mandates a trial plan that will violate due process, and there is no need to wait until after trial to see that this is so. The Due Process Clause protects against the "unreasonable and unnecessary risk" that petitioners will be punished for having caused injury to others. *Williams*, 127 S. Ct. at 1065; *supra* at 2-3, 11-12. The CMO poses such a risk. This Court has explained the fashion in which punitive damages must be adjudicated, *supra* at 11-19, and the CMO ensures that those constitutional requirements will not be met. In short, as the petition to this Court in *Philip Morris* v. *Accord* properly put it, "the constitutional violation is complete." *Accord Petition* at 30.

Second, there is no meaningful prospect that the West Virginia Supreme Court of Appeals will correct this violation. That court purported to deny review only "at this point," Pet. App. 10a, but this is a fig leaf. It previously has acknowledged that reverse bifurcation trial plans "are *common* in West Virginia." *In re Tobacco Litig.*, 624 S.E.2d 738, 742 (W. Va. 2005). In addition to this case and *Philip Morris* v. *Accord*, petitioners are aware of at least nine other West Virginia cases in which such reverse bifurcated plans have been imposed.[12] And, directly contrary to the implication that the West Virginia court may take up the issue after trial, see Pet. App. 10a, that court previously has declared that it will not abandon reverse bifurcation unless and until it receives a "clear indication" from this Court that it must. *In re Tobacco Litig.*, 624 S.E.2d at 741-42.

In any event, there is no meaningful prospect of effective review after trial. In the first place, appellate review is inadequate. At most it can reduce an un-

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[12] *See* Petition of Writ of Certiorari at 5, 10, *Union Carbide Corp.* v. *Recht*, No. 03-319, 2003 WL 22428919 (U.S. Aug. 22, 2003) (stating "punitive damages were assessed [in] Phase I" and that individual liability trials would follow); *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304-05 & n.9 (W. Va. 1996); *In re Asbestos Cases*, Civil Action No. 89-C-999 (Cir. Ct. of Kanawha County, W. Va. Feb. 15, 1989); *In re Asbestos Cases II*, Civil Action No. 91-C-7777 (Cir. Ct. of Kanawha County, W. Va. Mar. 13, 1991); *In re Asbestos Mass Trial, III*, Civil Action No. 92-C-8888 (Cir. Ct. of Kanawha County, W. Va. Feb. 6, 1992); *In re Asbestos Cases (Individuals)*, All Pending Cases (Cir. Ct. of Monongalia County, W. Va.); *In re Monongalia Mass II*, Civil Action [Docket No. Not Assigned] (Cir. Ct. of Monongalia County, W. Va.); *In re Asbestos Pers. Injury Litig., Sept. 2002 Trial Group*, Civil Action No. 02-C-9004 (Cir. Ct. of Kanawha County, W. Va. Sept. 23, 2002); *In re Asbestos Pers. Injury Litig., Mass Litig. Panel*, Civil Action No. 03-C-9800 (Cir. Ct. of Kanawha County, W. Va. Feb. 11, 2003).

constitutional punitive damages award to the constitutional maximum, but it cannot determine the level of punitive damages that *the jury* would have awarded, nor can it remove the prejudicial effect of trying punitive damages first. See generally *Accord Petition* at 31-32.

Moreover, the chances of a reverse-bifurcated punitive damages trial reaching appellate review are slim. As Justice Benjamin recognized in his dissent, the very imposition of such a trial plan creates tremendous settlement pressure: "[T]he right to defend yields to the need to settle." Pet. App. 15a n.1.[13] Indeed, the very *purpose* of reverse bifurcation is to encourage settlement. *Simon* v. *Philip Morris Inc.*, 200 F.R.D. 21, 25 (E.D.N.Y. 2001). This approach is deeply unfair when, as here, liability is vigorously contested, see *supra* at 3-5, and the unlikelihood of later appellate review makes it "crucial" that the Court intervene now. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Finally, concerns of judicial economy militate in favor of immediate review. Even if these trials did run their course, that would only mean needless expense for the courts and the parties. The time and cost of litigating this action would be substantial, particularly given the aggregation of numerous defendants in this one action. In *Philip Morris* v. *Accord*, likewise, there exists the possibility of hundreds of individual trials. See *Accord Petition* at 6-7, 30. All of

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[13] *See also, e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (recognizing settlement pressures in the class action context); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, C.J.) (discussing "intense pressure to settle" even under a less constitutionally suspect trial plan); Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 208.

this will be for naught, given the patent unconstitutionality of the course the West Virginia courts have set. And, beyond mere wasted cost, both plaintiffs and defendants will have suffered needless delay in receiving a binding adjudication of their claims and liabilities. Prudence dictates resolving these issues now.

* * * *

Because the trial plan approved by West Virginia's Supreme Court of Appeals is irreconcilable with this Court's precedents, and because it conflicts with the majority of lower courts to consider the issue, review is warranted. To permit the decision below to stand is to increase West Virginia's status as a haven for class action and mass-tort litigation, where plaintiffs may use unconstitutional tactics to exert massive settlement pressure on defendants, regardless how innocent. This should not stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, the petition should be held pending disposition of *Philip Morris USA Inc.* v. *Accord*, No. 07-806.

Respectfully submitted,

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February 8, 2008

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APPENDIX

APPENDIX A

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33380

STATE OF WEST VIRGINIA EX REL. CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Petitioners,

v.

HONORABLE JOHN T. MADDEN, Judge of the Circuit Court of Marshall County; and All Plaintiffs in *Stern, et al. v. Chemtall, Inc., et al.*, Marshall County Civil Action No. 03-C-49M,

Respondents.

Submitted Sept. 12, 2007
Decided Nov. 15, 2007

Benjamin, J., concurred in part, dissented in part, and filed an opinion.

Syllabus by the Court

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Petition for a Writ of Prohibition WRIT DENIED.

The Opinion of the Court was delivered PER CURIAM.

The petitioners and defendants below, suppliers and/or manufacturers of a chemical known as polyacrylamide, seek extraordinary relief to prevent the enforcement of two orders of the Circuit Court of Marshall County in an action brought by the respondents and plaintiffs below, current and former coal preparation plant workers, in which they seek medi-

cal monitoring for diseases they allegedly may develop in the future due to their exposure to polyacrylamide. For the reasons that follow, we deny the requested relief.[1]

I.

FACTS

The respondents and plaintiffs below are coal preparation plant workers who allegedly have been exposed to polyacrylamide which is an industrial water cleaner. The petitioners and defendants below are several corporations who manufactured, distributed, and/or sold polyacrylamide to coal preparation plants.[2] In their complaint, the respondents allege a

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[1] We wish to acknowledge the contribution of *amici curiae* in support of the petitioners including The West Virginia Chamber of Commerce, The Product Liability Advisory Council, Inc., The West Virginia Roundtable, West Virginia Manufacturers Association, Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Chemistry Council.

[2] The respondents originally were granted class certification in a seven-state class action including plaintiffs in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia. In *State ex rel. Chemtall, Inc. v. Madden*, 216 W.Va. 443, 607 S.E.2d 772 (2004), this Court vacated the seven-state class action. However, we authorized the circuit court to proceed to consider certification of appropriate classes and subclasses, and we further declined to order that the action proceed only as to the West Virginia plaintiffs. Thereafter, the plaintiffs withdrew all claims arising out of exposure in all of the states except West Virginia and Pennsylvania.

Subsequently, in *Stern v. Chemtall, Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005), this Court reversed the circuit court's denial of a motion to intervene in the underlying action and remanded the matter to the circuit court for entry of an order consistent with our opinion. We discuss our holding in *Stern* in greater detail in the body of this opinion.

cause of action for strict liability and seek medical monitoring and punitive damages.[3]

On January 9, 2007, the Circuit Court of Marshall County ordered that Franklin Stump, Danny Gunnoe, and Teddy Joe Hoosier be allowed to intervene in the underlying action. We will hereafter refer to this order as the "Intervention Order." Also, by order dated January 9, 2007, the circuit court adopted a trial plan in which the issues of liability and punitive damages will be bifurcated from medical monitoring and class certification. Specifically, the circuit court ordered that

> [t]he first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant. . . . Should Plaintiffs prevail on the issue of liability, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.

Finally, even though the circuit court did not certify a class consisting of Pennsylvania and West Virginia plaintiffs, it concluded, after a lengthy analysis, that the relevant laws of West Virginia and Pennsylvania are sufficiently compatible so that the claims of plaintiffs from both states can fairly be adjudicated in West Virginia. We will hereafter refer to this order as the "Trial Plan Order."

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[3] According to the respondents, although polyacrylamide is nontoxic, it contains acrylamide monomer, a toxin which has been linked to neurologic and reproductive injuries and diseases including certain types of cancer.

The petitioners subsequently filed the instant petition for a writ of prohibition and/or mandamus with this Court in which they ask us to vacate the Intervention Order to the extent that it permits Teddy Joe Hoosier to intervene in the underlying action. The petitioners further request that this Court vacate the Trial Plan Order as it pertains to the availability and recovery of punitive damages and the compatibility of West Virginia and Pennsylvania law. On April 19, 2007, this Court granted a rule to show cause why the requested relief should not be granted. We now deny the relief sought.

II.

STANDARD OF REVIEW

The petition herein is styled as one of "Prohibition and/or Mandamus." Because the petitioners seek to correct a pre-trial order, we will consider the relief sought to be a writ of prohibition. In *State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 78, 528 S.E.2d 768, 772 (2000), we indicated that "[t]his Court is empowered to exercise its original jurisdiction to review the legal propriety of a circuit court's pre-trial orders. This Court has specifically utilized the remedy of prohibition to correct a court's pre-trial order so that a unitary trial could occur." (Citation omitted.).

Concerning the standard for granting a writ, we have held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ

> has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). With these principles to guide us, we proceed to address the issues raised by the petitioners.

III

DISCUSSION

1. Intervention Order

In its January 9, 2007, Intervention Order, the circuit court, relying on this Court's decision in *Stern v. Chemtall, Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005), granted intervener status to Franklin Stump, Danny Gunnoe, and Teddy Joe Hoosier in the underlying action. The petitioners challenge this order to the extent that it permits the intervention of Teddy Joe Hoosier.

In *Stern*, Appellants Stump, Gunnoe, and Hoosier, along with others, appealed the Circuit Court of Marshall County's January 15, 2004, order that denied their motion to intervene in the underlying action. Two of the appellants, Stump and Gunnoe, were coal preparation workers and plaintiffs in a civil action pending at that time in the Circuit Court of Boone County, styled *Denver and Debra Pettry, et al. v. Peabody Holding Co., et al.*, Case No. 02-C-58, wherein they sought medical monitoring relief against some of the same defendants involved in the action in the Circuit Court of Marshall County. This Court, in Stern, referred to the litigation in the Circuit Court of Boone County as "the *Pettry* litigation" and the action in the Circuit Court of Marshall County as "the *Stern* litigation." Hoosier was not a party to the *Pettry* litigation or any litigation at that time. Rather, he sought to intervene on behalf of water treatment workers with similar medical monitoring claims as coal preparation plant workers based on exposure to the same chemical at issue in the Marshall County action. In *Stern,* this Court reversed the denial of the motion to intervene and remanded the matter to the Circuit Court of Marshall County for entry of an order consistent with our opinion. We further ordered that the *Pettry* litigation be transferred from the Circuit Court of Boone County to the Circuit Court of Marshall County.

The petitioners now claim that the circuit court erred on remand by permitting Hoosier, the water treatment worker, to intervene in the underlying action. The petitioners assert that *Stern,* by its clear language, mandates only that "the *Pettry* litigants," *i.e.*, Stump and Gunnoe, be permitted to intervene. In addition, the petitioners aver that the circuit court exceeded its jurisdiction in permitting the inter-

vention of water treatment workers in an action originally brought by coal preparation plant workers. According to the petitioners, the inclusion of water treatment workers will require separate evidence and analyses, extensive new discovery, and the retention of new experts.

We reject the petitioners' arguments. A careful reading of *Stern* indicates this Court's intent to permit Hoosier to intervene in the underlying action. Although it is true that we repeatedly referred to the interveners in *Stern* as "the *Pettry* litigants," we did not thereby exclude Hoosier as an intervener. To the contrary, Hoosier is clearly identified as one of the appellants who challenged the circuit court's order denying the motion to intervene. Moreover, this Court reversed the circuit court's order absent any indication whatsoever that our reversal did not apply to Hoosier. In addition, we believe that there are facts common to both water treatment and coal preparation plant workers, such as exposure to the same chemical and the question of risk of contracting the same diseases, which make intervention proper.[4] Finally, we note that the circuit court has not yet indicated how it intends to manage any differences with regard to these two groups of plaintiffs. Thus, a ruling by this Court at the present time would be premature. Accordingly, for these reasons, we deny the writ sought by the petitioners to vacate the circuit court's January 9, 2007, Intervention Order as it pertains to the intervention of Teddy Joe Hoosier.

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[4] According to West Virginia Rule of Civil Procedure 24(b), concerning permissive intervention, "[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

2. Trial Plan Order

A. Availability of Punitive Damages

Next, the petitioners challenge the circuit court's ruling regarding both the availability of punitive damages in cases in which only medical monitoring relief is sought and the procedure governing the determination of punitive damages. First, the petitioners assert that the procedure governing the determination of punitive damages is unconstitutional under the United States Supreme Court's recent decision in *Philip Morris USA v. Williams*, — U.S. —, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007).

The issue in *Philip Morris* was whether the Federal Constitution's Due Process Clause permits a jury to base a punitive damages award in part upon its desire to punish the defendant for harming persons who are not before the court. The Supreme Court concluded that such an award would amount to the taking of property from the defendant without due process. The principle announced by the Court in *Philip Morris* is that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris*, — U.S. —, —, 127 S.Ct. 1057, 1063, 166 L.Ed.2d 940. A basis for this rule is that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Id.* (Internal quotation marks and citation omitted.). In other words,

> . . . a defendant threatened with punishment for injuring a nonparty victim has no opportunity to

> defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

Id. According to the petitioners, the circuit court's procedure for awarding punitive damages violates the petitioners' due process rights as set forth in *Philip Morris* because it requires a jury to determine punitive damages without taking into account a plaintiff's individualized harm and prior to a finding of actual liability against any defendant.

We find no merit to the petitioners' contention. Plainly, the circuit court's trial plan, on its face, is not a clear error of law because it does not guarantee a result at odds with *Philip Morris*. Significantly, there has not yet been a trial in this case. No evidence has been adduced, none of the petitioners have been found liable for any tortious conduct, and punitive damages have not been assessed. Therefore, a decision on the constitutionality of punitive damages at this point would amount to nothing more than an exercise in speculation. Therefore, we believe the question of the constitutionality of punitive damages is best decided in light of a verdict based on a full development of the evidence at trial.

For this same reason, we also decline, at this early pre-trial stage, to address the petitioners' claim that punitive damages are not available in cases in which only medical monitoring damages are sought. Again, we are convinced that appellate review of this issue is better left to the review of a verdict after complete development of all the facts and testimony and after

a trial of all the issues.[5] Accordingly, we deny the petitioners' request to vacate the circuit court's January 9, 2007, Trial Plan Order as it pertains to punitive damages.

B. Compatibility of West Virginia and Pennsylvania Law

Finally, the petitioners assert that the circuit court erred in formulating a trial plan that fails to address the material differences in West Virginia and Pennsylvania law. We disagree. Generally, trial courts have broad discretion in matters of trial management and procedure. *See* Syllabus Point 2, *B.F. Specialty Co. v. Sledd*, 197 W.Va. 463, 475 S.E.2d 555 (1996) ("Trial Courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts, which includes the right to manage their trial docket."). We believe that the circuit court below is fully capable of formulating procedures that effectively address any differences in West Virginia and Pennsylvania law.[6] Therefore, we deny the petitioners' request to vacate the circuit court's ruling that plaintiffs in both West Virginia and Pennsylvania can adjudicate their claims in a West Virginia court.

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[5] At least one court has recognized that "it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring." *Carlough v. Amchem Products, Inc.*, 834 F.Supp. 1437, 1460 (E.D.Pa.1993), *citing Day v. NLO, Inc.*, 814 F.Supp. 646 (S.D.Ohio 1993); *Cook v. Rockwell Int'l Corp.*, 755 F.Supp. 1468 (D.Colo. 1991); *Catasauqua Area School Dist. v. Raymark Indus., Inc.*, 662 F.Supp. 64 (E.D.Pa. 1987); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988).

[6] In its Trial Plan Order, the circuit court suggested the application of Pennsylvania laws to the claims of Pennsylvania plaintiffs and West Virginia laws to the claims of West Virginia plaintiffs.

Prior to concluding, we feel compelled to emphasize and strongly note that the underlying action was originally filed in March 2003, and has not yet gone to trial. Further, the instant case is the third time that the parties below have sought the intervention of this Court in pre-trial matters.[7] We hope the litigants understand and appreciate the difficulty this Court faces in trying to decide so many issues pre-trial, in the limited context of extraordinary remedies, and in the absence of a meaningful, fully-developed factual record. Accordingly, we trust the lawyers and parties will now focus vigorously on letting these cases be tried by a trial court. Having disposed of the issues raised herein, we are confident that the parties can now proceed to trial without further delay and without the necessity of additional guidance from this Court. Finally, we reiterate our statement in *Stern* that "we believe that the circuit court is in a better position [than this Court] to manage this litigation and to protect the interests of [the parties]. The circuit judge should manage the cases and the issues herein as he deems appropriate." *Stern*, 217 W.Va. at 338, 617 S.E.2d at 885.

IV.

CONCLUSION

Having found no clear error as a matter of law in the circuit court's Intervention Order and Trial Plan Order, we deny the writ of prohibition sought by the petitioners.

Writ Denied.

Chief Justice DAVIS, deeming herself disqualified, did not participate in the decision in this case.

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[7] *See* n. 2, *supra*.

Judge PRATT, sitting by special assignment.

Justice BENJAMIN concurs in part, dissents in part, and reserves the right to file a separate opinion.

BENJAMIN, *Justice*, concurring and dissenting:

For the reasons discussed below, I concur with the majority as to its holding regarding the circuit court's January 9, 2007, Intervention Order, and dissent as to its holding pertaining to the circuit court's January 9, 2007, Trial Plan Order.

The majority reached the correct decision in denying the writ sought by petitioners to vacate the circuit court's January 9, 2007, Intervention Order as it pertains to Teddy Joe Hoosier. While I am not entirely convinced, as is the majority, that the facts and legal issues will indeed prove to be common to both water treatment and coal preparation plant workers, the fact remains that the circuit court has not yet indicated how it intends to manage any differences with regard to these two groups of plaintiffs, and, to date, no discovery regarding water treatment workers has been conducted. Before this Court's intervention becomes necessary, further factual development on this issue is needed to affirmatively ascertain whether the petitioners will be prejudiced in a way that is not correctable on appeal. Accordingly, because it is premature at this juncture to grant a writ regarding this issue, I concur with the majority's decision to deny relief at the present time.

I respectfully dissent from the majority's opinion as to petitioner's challenge of the circuit court's Trial Plan Order and its rulings regarding the availability of punitive damages in medical monitoring cases, the procedure governing the determination of punitive damages, and the compatibility of West Virginia and Pennsylvania law. The petitioners present important issues of law that are matters of first impression before this Court and the Trial Plan Order facially serves to prejudice the petitioners in a way that is

not correctable on appeal. Delaying a consideration of the matters raised herein until an eventual appeal poses a distinct potential for prejudice to the due process rights of the petitioners.[1] Thus, I believe it is incumbent upon this Court to now entertain and issue the writ of prohibition regarding these matters.

1) The Circuit Court Committed Clear Error Because The Trial Plan Order, As It Pertains to Punitive Damages, Violates the Due Process Clause.

The Trial Plan Order, as it pertains to punitive damages, denies the defendants' due process rights for three pivotal reasons. First, because a class has not yet been certified, it is unconstitutional to require a procedure for determination of punitive damages and a punitive damages multiplier in a phase one trial that does not take into account only the harm to individual plaintiffs and does not determine liability as to any defendant. Second, I seriously question the constitutionality of permitting a punitive damages claim to proceed in a medical-monitoring case, where the plaintiffs merely seek equitable, not compensable, relief. Finally, the appropriateness of punitive damages cannot, and should not, be determined prior to a finding of underlying liability.

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[1] Our inaction constrains the effective choices realistically available to the petitioners to such a degree as to implicate grave due process considerations. By failing to confront the issues raised herein, we are acquiescing to a system whereby case management machinations and procedural chicanery rather than substantive law and facts appear to determine the outcome of the litigation. The right to defend yields to the need to settle.

A) Due process requires that a jury determine that punitive damages are based on a plaintiff's individualized harm.

Punitive damages are a deprivation of property requiring safeguards to ensure that any such award is not arbitrary and fully comports with due process. *Philip Morris v. Williams*, — U.S. —, 127 S.Ct. 1057, 1061, 166 L.Ed.2d 940 (2007). This requirement applies both to the procedures applicable to the jury's decision to award punitive damages and the calculation of the amount. 127 S.Ct. at 1061. By mandating that punitive damages be addressed in the first trial phase, before a class has been certified, the circuit court's Trial Plan Order fails to ensure that any punitive damages award is reasonably related to any actual harm suffered by any plaintiff. The petitioners are essentially left with no way to address individualized claims of particular plaintiffs, and demonstrate how their particularized exposures, if any, caused no increased risk of contracting a particular disease. Unquestionably, this procedure does not comport with the holdings of the Supreme Court in *Philip Morris*.

In *Williams*, the Supreme Court found that the trial court violated defendant's due process rights when it failed to ensure that the jury did not base its punitive damages award "in part upon its desire to punish the defendant for harming persons who are not before the court." *Id.* at 1060. The Court ruled that a punitive damages award must rely upon the defendant's conduct toward the plaintiff. *Id.* at 1063. Otherwise, a defendant has no adequate notice of the magnitude of the penalty that might be assessed against it; no ability to raise its defenses against the claim of persons not before the court; and no oppor-

tunity to contest liability as to such individuals. *Id.* Therein, the Supreme Court also stated:

> [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer-—risks of arbitrariness, uncertainty and lack of notice—will be magnified . . .
>
> [W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the plaintiff.

Id. (internal citations omitted).

The Supreme Court warned that procedural safeguards must be employed to ensure that juries do not impose awards that run afoul of the Due Process Clause:

> [G]iven the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies . . . upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries . . .—it is particularly impor-

> tant that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

Id. at 1064 (internal citation omitted).

None of our prior decisions concerning mass tort trial plans have contemplated the scenario where punitive damages are permitted to be assessed before a class has been certified in an action seeking only medical-monitoring damages. For example, in *In re West Virginia Rezulin Ligitation*, 214 W.Va. 52, 585 S.E.2d 52 (2003), an action seeking both a monetary award for medical monitoring costs and compensatory damages, this Court discussed only the appropriateness of class treatment, and did not touch at all upon the issue of whether or how punitive damages would be available. Additionally, the medical monitoring cases in *In re Tobacco Litigation*, 215 W.Va. 476, 600 S.E.2d 188 (2004), involved a decision stemming from a defense verdict at trial, where personal injury claims were asserted by individuals who were required to prove specific causation, actual damages, and entitlement to punitive damages. A punitive damages award was not at issue in that case either. Thus, as I see it, there are no prior decisions of this Court that directly govern, in their entirety, the issues of first impression presented by this action.

The Trial Plan Order at issue here does not contain the necessary procedural safeguards to ensure that due process is afforded. By trying punitive damages during the first phase of trial, the petitioners are prevented from presenting every available defense, and from confronting and cross-examining adverse witnesses. As the petitioners correctly point out, the universe of plaintiffs will not even be defined until after a trial on the merits, and thus, the petitioners will have no assurance as to whether additional indi-

viduals will be bound by the judgment; who those individuals might be through class descriptions; and how the time frames might be defined for those plaintiffs. Indeed, the applicable time frame is directly relevant to the issue of what conduct of any given defendant a jury is permitted to consider in connection with a punitive damages award. Behavior that a jury could conceivably find culpable that occurred in 1969 versus 1999, will not apply to all defendants, or to all named plaintiffs, or to all potential future class-members. Accordingly, I believe it is constitutionally inappropriate to delay class certification proceedings when the plaintiffs seek to obtain a punitive damages judgment on a class-wide basis.

B) The circuit court's order is unconstitutional because it requires a determination of punitive damages prior to any finding of actual liability against any defendant.

In its order, the circuit court bifurcated "liability and punitive damages" from "medical monitoring and class certification." Phase One therefore excludes key components of liability, such as actual causation and all factors of *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 139, 522 S.E.2d 424 (1999), necessary to determine the appropriateness of medical monitoring, and mandates a determination of punitive damages ahead of any liability finding. I believe this procedure is constitutionally flawed, particularly in light of the United States Supreme Court's recent decision in *Williams*. Punitive damages must "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred," and can be awarded only if a defendant is liable to a plaintiff. Syl. Pts. 1 and 3, in part, *Garnes v. Fleming Landfill,*

Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). As stated above, I believe that the instant litigation is an entirely different case from other medical monitoring cases previously considered by this Court. Because this case is the first class-action that seeks *only* medical-monitoring damages, and not compensatory damages, it presents issues of first impression never squarely addressed by this court. Accordingly, I am not convinced that it is appropriate, as it was in *In re Tobacco Litigiation* to permit an assessment of punitive damages prior to making a finding of liability in the instant action.

C) Punitive damages are not appropriate in an equitable medical monitoring class action.

I also believe that the circuit court has exceeded its authority by permitting the respondents to proceed with a punitive damages claim in this matter. Our Court has defined the "injury" claimed by medical monitoring plaintiffs as a "significantly increased *risk* of contracting a particular disease." *See State ex rel. Chemtall v. Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004) (emphasis added). A plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure. "All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and '[n]o particular level of quantification is necessary to satisfy this requirement.'" *Bower*, 206 W.Va. at 142, 522 S.E.2d at 433. Our Court has long recognized that a plaintiff may not recover punitive damages in the absence of actual harm and recovery of compensatory damages. *See Garnes*, 186 W.Va. at 667 & Syl. Pt. 1, 413 S.E.2d 897. Because the respondents have not asserted

personal injury claims, as they have not suffered any actual, present physical injuries from their alleged exposure to petitioners' products, punitive damages simply should not be available in this case.

Furthermore, the Due Process Clause requires a jury to measure the entitlement to punitive damages by the amount of harm suffered by the respondents, and prohibits "grossly excessive or arbitrary punishments." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). A proper measure of punitive damages begins with a determination of the proportionality between compensatory damages and punitive damages. *Id.*, 538 U.S. at 418. Any award of punitive damages in this class action will be completely arbitrary because there are no actual compensatory damages on which to base a multiplier. This Court has never before permitted a phase one trial of partial liability plus punitive damages entitlement and multiplier to occur in an uncertified, medical-monitoring class action in which no personal injury claims have ever been brought. To permit punitive damages in a case of this nature is to create a landslide on the existing slippery slope of our traditional injury-based tort law.

2) The Circuit Court Committed Clear Error Because the Trial Plan Order Fails to Address Material Differences Between West Virginia and Pennsylvania Law.

Finally, it is my opinion that the material differences between our law and Pennsylvania's law make the circuit court's trial plan simply unworkable. Rule 23(a)(3) of the West Virginia Rules of Civil Procedure requires that the "claims or defenses of the representative parties [be] typical of the claims or de-

fenses of the class." A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. *State ex rel. Chemtall v. Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004). In *Chemtall I*, this Court stated that:

> In the instant case the representative parties were all allegedly exposed to acrylamide in West Virginia which means that West Virginia law on medical monitoring should be applied to the representative plaintiffs. Respondents must therefore show, and the circuit court must find, that the West Virginia medical monitoring claims are typical of the medical monitoring claims of the proposed class members who were allegedly exposed in other states. In other words, it must be shown, among other things, *that their claims are based on the same legal theory.*

Id. (Emphasis in original).

This Court also provided guidance in that decision by stating that:

> In order for the representative plaintiffs who were allegedly exposed in West Virginia to show that they could represent the proposed class members allegedly exposed in the other states, they must show that the other states recognize medical monitoring causes of action which are *reasonably co-extensive* with the medical monitoring causes of action in West Virginia. This is due to the fact that the typicality requirement requires the representative plaintiffs to establish

> "the bulk of the elements of each class member's claim when they prove their own claims."

Id. (Emphasis added).

In West Virginia, it is well settled that product manufacturers can be held strictly liable when a product defect is proven. Thus, causation essentially need not be proven in order to establish liability. Petitioners assert that, in Pennsylvania, however, liability must be proven by demonstrating negligence on the part of the product manufacturer. *See, e.g., Redland Soccer Club, Inc. v. Department of the Army and Department of Defense of the U.S.*, 548 Pa. 178, 696 A.2d 137, 145 (Pa. 1997). They assert that unlike West Virginia, Pennsylvania has not yet adopted a strict liability theory of proof. The trial plan, as postured, does not seek to litigate the issue of negligence for those Pennsylvania claims. It only assumes that strict liability would apply. Although the circuit court, by pointing to a Third Circuit decision, *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3rd Cir. 1998) (assuming without deciding that the Pennsylvania Supreme Court would allow an intentional tort or strict product liability claim for medical monitoring), believes that Pennsylvania would be inclined to adopt strict liability if it were presented with the issue, the fact remains that Pennsylvania's highest state court has not yet made such a ruling.

Without conducting an in depth review of Pennsylvania law on this issue, if the state of the law in Pennsylvania is what petitioners say it is, then there does in fact appear to be material differences in West Virginia and Pennsylvania law regarding issues of liability in a medical monitoring action. Accordingly, as a matter of constitutional full faith and credit and due process principles, the West Virginia and Penn-

sylvania claims cannot be tried under one cohesive trial plan. I believe that the circuit court commits clear in error in attempting to expand Pennsylvania law to include strict liability claims for purposes of this case. At the very least, the parties should have been given ample opportunity by the circuit court to brief these issues and present them for oral argument, prior to making its own unilateral decision.

In summary, medical monitoring claims, particularly in the class action context, present new and important challenges for both the circuit courts and litigants. In light of this, I am troubled by this Court's unwillingness to entertain the matters before us here, as they are properly ripe for adjudication. The errors below require correction now, to ensure that the parties and the circuit court avoid the time, expense, and prejudice of a constitutionally infirm trial. Accordingly, I believe this Court should take the opportunity to address these issues and I would grant the writ.

For these reasons I have set forth, I respectfully concur to and dissent from the majority's opinion.

APPENDIX B

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

Civil Action No. 03-C049M

WILLIAM K. STERN, *et al.*,
Plaintiffs,

v.

CHEMTALL INCORPORATED, et al.,
Defendants.

AND

Civil Action No. 02-C-58
(Boone County Circuit Court)

DENVER PETTRY and DEBRA PETTRY, *et al.*,
Plaintiffs,

v.

PEABODY HOLDING COMPANY, *et al.*,
Defendants.

MEMORANDUM ORDER

This matter comes before the Court from the West Virginia Supreme Court of Appeals on a Decision filed December 2, 2004 which granted the relief sought through prohibition and vacated the September 26, 2003 Order of this Court certifying a seven-state class action for medical monitoring and punitive damages arising out of the alleged exposure of coal preparation plant workers to acrylamide-containing products. The Supreme Court of Appeals held that this Court's analysis in comparing West Virginia law with the applicable laws of the other states on strict liability, medical monitoring, punitive damages and statute of limitations was "inadequate

because it was made without conducting a thorough analysis and absent detailed and specific findings to support it. . . Our review of the Circuit Court's Order indicates that the Circuit Court committed clear error in failing to consider West Virginia conflict of law doctrine and in failing to conduct a meaningful analysis of variations in the laws of the several states included in the proposed class action." *State ex rel. Chemtall Incorporated, et al. v. Madden*, 216 W.Va. 443, 452, 607 S.E.2d 772, 781 (2004). Further, the Supreme Court of Appeals held that this Court "clearly erred in failing to conduct a thorough analysis and in failing to set forth detailed and specific findings to support the conclusion that the Respondents satisfied the requirements of Rule 23(a)." *State ex rel. Chemtall Incorporated, et al. v. Madden*, 216 W.Va. at 454, 607 S.E.2d 783. In vacating this Court's September 26, 2003 Class Certification Order, the West Virginia Supreme Court of Appeals authorized this Court "to proceed with necessary hearings, including consideration of further certification of appropriate classes and subclasses. . . ." *State ex rel. Chemtall Inc. v. Madden*, 216 W.Va. at 457, 607 S.E.2d 786.

On July 7, 2006, a hearing was held to address outstanding issues. At that time, counsel for *Stern* Plaintiffs withdrew, without prejudice, all claims, including all class action allegations, against all Defendants arising out of or in any way related to exposure in the states of Illinois, Indiana, Ohio, Tennessee and Virginia. Accordingly, only Plaintiffs' claims arising out of exposure in West Virginia and Pennsylvania are remaining.

I.

COMPARATIVE ANALYSIS OF WEST VIRGINIA AND PENNSYLVANIA LAW

The Court will now evaluate the laws of the State of West Virginia and the Commonwealth of Pennsylvania to determine whether or not the relevant laws of both jurisdictions are compatible, and whether or not adjudication in a West Virginia court would be fundamentally fair to all parties.

A. STRICT LIABILITY.

The products liability laws of both West Virginia and Pennsylvania recognize causes of action in strict liability. Although West Virginia has not adopted Section 402A of the Restatement (Second) of Torts, the standard for establishing strict liability is "not substantially different" than 402A. *Morningstar v. Black & Decker Manufacturing Co.*, 162 W.Va. 857, 883, 253 S.E.2d 666, 680 (1979). "[T]he general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use." *Morningstar*, 162 W.Va. at 857, 253 S.E.2d at 667 (syl. pt. 4).

In West Virginia, [t]he term "unsafe" imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to the economic costs, at the time the product was made." *Morningstar*, 162 W.Va. at 857, 253 S.E.2d at 667 (syl. pt. 5).

Pennsylvania has adopted Section 402A of the Restatement (Second) of Torts. *See Webb v. Zern*, 422

Pa. 424, 220 A.2d 853 (1966); *Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186 (1997).

In Pennsylvania, one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. Restatement (Second) Torts § 402A (1965).

Also, in Pennsylvania, a product is defective "where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for its intended use." *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978). These standards are consistent with those laid out in *Morningstar* and its progeny. Both states' standards embody the substance, whether or not expressly adopted, of Section 402A.

B. MEDICAL MONITORING.

Both West Virginia and Pennsylvania permit products liability plaintiffs to recover damage awards for the cost of medical monitoring. In order to recover medical monitoring damages "under West Virginia law, the Plaintiff must prove that he or she has been significantly exposed; to a proven hazardous substance; through the tortious conduct of the Defendant; as a proximate result of the exposure, Plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; the increased risk of disease makes it rea-

sonably necessary for the Plaintiff to be under periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and monitoring procedures exist that make the early detection of the disease possible." *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 141-42, 522 S.E.2d 424, 432- 33 (1999).

In Pennsylvania, "a Plaintiff must prove the following elements to prevail on a common law claim for medical monitoring: exposure to greater than normal background levels; to a proven hazardous substance; caused by Defendant's negligence; as a proximate result of the exposure Plaintiff has a significantly increased risk of contracting a serious latent disease; a monitoring procedure exists that makes the early detection of the disease possible; the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles." *Redland Soccer Club, Inc. v. Dept. of the Army, et al.*, 548 Pa. 178, 195-96, 696 A.2d 137, 145-46 (1997). The Third Circuit Court of Appeals has noted that in *Redland*, the Pennsylvania Supreme Court held that "'medical monitoring' Plaintiffs must prove the Defendant's negligence caused the exposure.'" *Barnes v. American Tobacco Co.*, 161 F.3d 127, 152 n. 31 (3d Cir. 1998). However, the *Barnes* Court "assume[d] without deciding that the Pennsylvania Supreme Court would allow an intentional tort or strict product liability to the underlying theory of liability in a claim for medical monitoring." *Id.*

Slight semantic differences aside, the Pennsylvania and West Virginia standards contain the same seven elements. Indeed, the *Bower* Court cited *Redland*

Soccer Club in developing the medical monitoring standard in West Virginia. While it is true that the legal standard for medical monitoring expressed by the *Redland* court spoke in terms of a defendant's negligence, the Pennsylvania Supreme Court first recognized the viability of medical monitoring in a strict liability case. *See Simmons v. Pacor, Inc.*, 543 Pa. 664, 673-79, 674 A.2d 232, 236-39 (1996).[1] At this point, any difference between the laws of West Virginia and Pennsylvania on this issue does not appear to make the claims of plaintiffs from the latter "reasonably coextensive with the medical monitoring causes of action in West Virginia." *State ex rel. Chemtall Inc. v. Madden*, 216 W.Va. at 455, 607 S.E.2d 784.

C. PUNITIVE DAMAGES.

A jury in West Virginia may allow punitive damages against a Defendant for "willfulness, wantonness, malice, or other like aggravation. . ." *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603, syl. pt. 19 (1983). Also, West Virginia recognizes awards for punitive damages in products liability cases. *See Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E. 2d 557 (1992) (evidence sufficient to support punitive damages in asbestos exposure case); *Ilosky*

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[1] Several Pennsylvania trial courts have refused to permit medical monitoring as an element of damages in a strict liability claim. *See, e.g., Brown v. Dickinson*, 2000WL33342381 (Pa. Ct. Com. Pl. 2000). However, Pennsylvania's Supreme Court has not passed on the specific issue. In addition to the Third Circuit's predictive opinion in *Barnes*, at least one Pennsylvania appellate court has permitted plaintiffs in a class action to seek medical monitoring damages in a case involving a theory of strict liability. *Wagner v. Anzon, Inc.*, 684 A.2d 570 (Pa. Super Ct. 1996).

v. Michelin Tire Corp., 172 W.Va. 435, 307 S.E.2d 603 (1983) (plaintiff injured in accident caused from a defective tire).

In Pennsylvania, punitive damages may be appropriately awarded when the Defendant has acted in a fashion "so outrageous as to demonstrate willful, wanton, or reckless conduct." *Phillips v. Cricket Lighters*, 584 Pa. 179, 189, 883 A.2d 439, 445 (2005) *citing Hutchinson v. Luddy*, 870 A.2d 766, 770 (Pa. 2005). Likewise, Pennsylvania allows an award of punitive damages in products liability cases. *See Neal v. Carey Canadian Mines, L.T.D.*, 548 F.Supp. 357 (E.D.Pa 1982) (products liability action against manufacturers of asbestos containing products); *Phillips v. Cricket Lighters*, 548 Pa. 179, 883 A.2d 439 (2005) (products liability action against manufacturers and distributors of disposable butane lighters). The type of conduct that justifies punitive damages is the same in West Virginia and Pennsylvania.

D. STATUTE OF LIMITATIONS.

In West Virginia, "a medical monitoring cause of action accrues when a Plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has a significantly increased risk of contracting a particular disease due to significant exposure to a proven hazardous substance and the identity of the party that caused or contributed to the Plaintiff's exposure to the hazardous substance." *State ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 456, 607 S.E.2d 772, 785 (2004). "A cause of action for medical monitoring lies in tort. According to *W.Va. Code* § 55-2-12 (1959), the statute of limitations applicable to tort action in West Virginia, '[e]very personal action for which no limitation is otherwise prescribed shall be brought . . . within two years next

after the right to bring the same shall have accrued if it be for damages for personal injuries[.]'" *State ex rel. Chemtall*, 216 W.Va. at 455, 607 S.E.2d at 784.

In Pennsylvania, a medical monitoring claim asserted by smoker against cigarette manufacturers accrued for limitation purposes "when the Plaintiff was placed at significantly increased risk of contracting serious latent disease." *Barnes v. The American Tobacco Co.*, 984 F.Supp. 842, 859 (E.D. Pa. 1997). Strict liability as the underlying claim for medical monitoring is governed by the two year statute of limitations in 42 *Pa. Cons. Stat. Ann.* § 5524. *See Barnes*, 984 F.Supp. at 857. Pursuant to the discovery rule, the statute of limitations begins to run when "the Plaintiff knows, or in the exercise of reasonable diligence should have known (1) that he has been injured, and (2) that his injury has been caused by another's conduct." *Barnes*, 984 F.Supp. at 857 citing *Bradley v. Ragheb*, 429 Pa. Super. 616, 633 A.2d 192, 194 (1993). Both Pennsylvania and West Virginia have two-year statutes of limitation, and both apply the discovery rule thereto.

E. OTHER POTENTIAL DEFENSES.

While the Supreme Court's *Chemtall* opinion did not specifically suggest an analysis of the various potential legal defenses was necessary as to both jurisdictions, counsel for certain defendants have argued that such defenses are materially different in the various states. Even though this Court has no evidence to demonstrate the applicability of any of the following defenses, nevertheless, it has thoroughly evaluated the potential product liability defenses. As the Court intends to try the issue of product defect first in this case, discussion is limited

to products liability defenses raised in the defendants' pleadings.

1. Manufacturer vs. Seller Liability.

Pennsylvania and West Virginia allow strict products liability for both manufacturers and sellers of defective products. Under Pennsylvania law, strict products liability "may be imposed upon the manufacturer, and others who take title to or have physical control over the product." *Neal v. Carey Canadian Mines, Inc.*, 548 F. Supp. 357, 373 (D.C. Pa. 1982). For liability to attach, the seller must be "engaged in the business of selling such a product," and the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966).

In West Virginia, "[b]ecause the product manufacturer is not always accessible to the plaintiff, strict liability extends to those in the product's chain of distribution." *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 46, 459 S.E.2d 151, 157 (1995). The general principle of strict liability throughout the distributive chain runs through the laws of each state.

2. Contributory/Comparative Negligence and Related Issues.

In Pennsylvania, comparative fault is no defense in a strict products liability case. *Parks v. AlliedSignal, Inc*, 113 F.3d 1327, 1334 (3rd Cir. 1997). Similarly, "misuse by [a] consumer does not provide [an] absolute defense in [a] strict liability case under Pennsylvania law; only unforeseeable contributory conduct by [a] consumer will insulate [a] manufacturer from strict products liability." *Nowak By and*

Through Nowak v. Faberge, U.S.A., Inc., 812 F. Supp. 492, HN 3 (M.D. Pa. 1992). "The misuse must be extraordinary and '. . . whether the act is reasonably foreseeable [is] to be determined by following retrospectively the sequence of events and looking back from the harm to the negligent act rather than by considering whether the defendant should prospectively have envisioned the events which unfolded and caused the accident.'" *Id.* at 496.

Assumption of the risk is a complete defense in a strict products liability claim, and exists where "the plaintiff knew of the defect and voluntarily and unreasonably proceeded to use the product or encounter a known danger." *Lonon v. Pep Boys, Manny, Moe, & Jack*, 538 A.2d 22, 25 (Pa. Super. Ct. 1988). "Evidence that a plaintiff engaged in highly reckless conduct also has been deemed admissible in a strict liability action. To demonstrate that a plaintiff's actions are highly reckless, it must be shown that he knew or had reason to know of facts which created a high degree of risk of physical harm to himself or that he deliberately proceeded to act, or failed to act, in conscious disregard of that risk. Evidence that a plaintiff acted in a highly reckless fashion is akin to evidence that a plaintiff misused a product." *Charlton v. Toyota Indus. Equipment*, 714 A.2d 1043, 1047 (Pa. Super. Ct. 1998).

In West Virginia, "comparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained of conduct is not a failure to discover a defect or to guard against it." *Star Furn. Co. v. Pulaski Furn. Co.*, 171 W. Va. 79, 88, 297 S.E.2d 854, 863 (1982). "The defense of assumption of risk is available against a plaintiff in a product liability case where it is shown

that the plaintiff had actual knowledge of the defective or dangerous condition, fully appreciated the risks involved, and continued to use the product. However, the plaintiff is not barred from recovery unless his degree of fault under assumption of risk equals or exceeds the combined fault of the other parties to the accident." *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119, 130, 454 S.E.2d 413, 424 (1994).

"[T]he seller is not liable when the product is materially altered before use, or is combined with another product which makes it dangerous, or is mishandled, or used in some unusual and unforeseeable way, as when a wall decorating compound is stirred with the finger, or nail polish is set on fire, or an obstinate lady insists on wearing shoes two sizes too small. The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable." *Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 889, 253 S.E.2d 666, 683 (1979).

In West Virginia, strict products liability actions are governed by comparative fault principles. Defenses such as assumption of the risk and product misuse merely limit, rather than barring entirely, a plaintiff's recovery. Pennsylvania generally has a comparative fault system, but has refused to apply any comparative fault principles to its law of strict products liability. In Pennsylvania, assumption of the risk, product misuse, and recklessness are complete defenses, but courts have applied the doctrines only in relatively extreme circumstances.

Importantly, in both jurisdictions, a plaintiff cannot be at fault for failing to discover a hazardous condition of which he or she had no knowledge. *See,*

e.g., Star Furniture Co. v. Pulaski Furniture Co., 171 W. Va. 79, 88, 297 S.E.2d 854, 862 (1982) ("a plaintiff's failure to discover a defect or to guard against it should not be considered contributory negligence"); *Walters v. Char-Mar, Inc.*, 284 A.2d 139, (Pa. Super. Ct. 1971) (the "law operates to negate the doctrine of contributory negligence when harm results from a concealed danger, of which the victim has no actual or constructive notice"). The differences in the laws of West Virginia and Pennsylvania in matters of fault apportionment are strictly legal in nature. Should any of these defenses arise, the Court is fully capable of applying those laws to the facts as determined by a jury, and with regard for both constitutional concerns and West Virginia choice of law principles.

3. "Open and Obvious Danger" Doctrine.

The Third Circuit has found that under Pennsylvania law, there is no duty to warn of open and obvious dangers, or those that would be recognized by "the ordinary consumer who purchases or uses the product, with the ordinary knowledge common to the community as to its characteristics." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 119 (1992) (punctuation omitted).

While it appears that West Virginia's Supreme Court of Appeals has not passed on the issue of a manufacturer's duty to warn of open and obvious dangers in the strict products liability context, a federal district court in West Virginia has cited "the general rule in trespass to land cases that no duty to warn of open and obvious dangerous conditions exists under West Virginia law," as well as the general products liability rule to the same effect. *Wilson v.*

Brown & Williamson Tobacco Corp., 968 F. Supp. 296, 301 (S.D. W. Va. 1997).

Pennsylvania has incorporated the "open and obvious danger" doctrine into its law of products liability, while federal courts in West Virginia have applied the doctrine. The absence of explicit West Virginia Supreme Court authority on the issue does not create a material difference in the laws of the two jurisdictions.

4. "Unavoidably Unsafe" Products.

The Pennsylvania Supreme Court has cited the Restatement's "unavoidably unsafe" exception to strict products liability in noting that in cases involving "unavoidably unsafe" prescription drugs, "the basis of liability in such a case is the failure to exercise reasonable care rather than strict liability." *Hahn v. Richter*, 673 A.2d 888, 890-91 (Pa. 1996).

West Virginia has not expressly adopted the Restatement exception to strict liability for "unavoidably unsafe" products, but according to a federal court in West Virginia, "[i]t seems likely that in adopting a strict products liability rule 'not substantially different' from § 402(A) . . . the West Virginia courts would also apply the [Restatement (2d) Torts] comment k exception where a product is proven to be unavoidably unsafe." *Rohrbough v. Wyeth Labs, Inc.*, 719 F. Supp. 470, n. 1 (N.D. W. Va. 1989), *aff'd* 916 F.2d 970 (4th Cir. 1990).

In Pennsylvania, there is some authority for application of the "unavoidably unsafe product" exception to strict liability, and while West Virginia has not expressly adopted it, at least one federal court has predicted that the West Virginia Supreme Court would do so. As in the case of the "open and obvious

danger" doctrine, the absence of mandatory on-point authority does not create a material difference that would render the claims of West Virginia and Pennsylvania plaintiffs incompatible.

5. Compliance with Regulatory/Industry Standards.

Evidence of a manufacturer's compliance with industry standards or customs is irrelevant to and inadmissible in strict products liability claims in Pennsylvania. *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 528 A.2d 590, 594 (Pa. 1987). In West Virginia, "[c]ompliance with the appropriate regulations is competent evidence of due care, but not *conclusive* evidence of due care." *Miller v. Warren*, 182 W. Va. 560, 562, 390 S.E.2d 207, 208 (1990) (emphasis in original). Evidence of the state of the art is also relevant and admissible. *Id.*

This difference between the laws of West Virginia and Pennsylvania is not "material" in the sense of rendering the claims of plaintiffs from the two states incompatible. As with any claim where evidence is admissible against one party, but not another, a limiting instruction is a more palatable remedy than severance of claims, and the attendant duplication of efforts in bringing those separate actions.

6. Sophisticated User/Learned Intermediary.

"[I]t is established under Pennsylvania law that a prescription drug manufacturer may meet its duty to warn by providing an adequate warning to a "learned intermediary," as opposed to the general public or individual users." *Mazur v. Merck & Co.*, 964 F.2d 1348, 1355 (2nd Cir. 1992). In West Virginia, "[u]nder the 'learned intermediary doctrine,' where drugs or medical devices are only available to [the] public by

[a] prescription from [a] physician or dentist, [a] products manufacturer fulfills its duty to warn by advising [the] professional of [the] dangers of [the] product and has no duty to warn [the] patient." *Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334, HN 6 (N.D. W. Va. 1995).

Pennsylvania and West Virginia treat the learned intermediary/sophisticated user doctrine in the same fashion. Both have adopted the learned intermediary doctrine in cases involving prescription drugs, but neither has extended it beyond that sphere, or adopted a broader sophisticated user defense.

7. Post-sale Warnings.

At least one Pennsylvania court has imposed a post-sale duty to warn where the manufacturer of a defective product component advised the manufacturer of a finished product of a defect, and the downstream manufacturer failed to convey the warning along to the customer. *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992). *But see DeSantis v. Frick Co.*, 745 A.2d 624 (Pa. Super. Ct. 1999) (finding no post-sale duty to warn where no defect existed at the time of the sale).

West Virginia's Supreme Court of Appeals has indicated that while a manufacturer's duty to warn in strict liability "is to be tested by what the reasonably prudent manufacturer would accomplish . . . at the time the product was made," the Court has not decided whether or not a post-sale duty to warn exists under a negligence theory. *Johnson by Johnson v. General Motors Corp.*, 190 W. Va. 236, 245, n. 5, 438 S.E.2d 28, 37 (1995). The Johnson Court noted that "[o]ne commentator noted that most courts have held that a seller has a post-sale duty to

warn." *Id., citing* Royal, R.A., "Post-Sale Warnings: A Review and Analysis Seeking Fair Compensation Under Uniform Law." 33 *Drake L. Rev.* 817, 831-32 (1983-84).

In summary, there is some authority in Pennsylvania supporting post-sale warnings, and in West Virginia, no such duty exists in strict products liability, but may exist in negligence. The undeveloped state of the law on this issue in both states makes it difficult to say that their laws conflict in any material way.

8. Joint and Several Liability/Contribution/ Indemnity.

Prior to 2002, Pennsylvania law provided for joint and several liability among joint tortfeasors, allowing an "injured party to satisfy an entire judgment against any one tortfeasor, even if the wrongdoing of that tortfeasor contributed only a small part to the harm inflicted." *Glomb v. Glomb*, 530 A.2d 1362, 1365 (Pa. Super. Ct. 1987). "A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify "a reasonable basis for determining the contribution of each cause to a single harm." *Id.* In 2002, Pennsylvania's legislature attempted to amend the relevant comparative negligence statute, 42 Pa. Cons. Stat. 7102, to eliminate joint and several liability in some circumstances, but Pennsylvania's Commonwealth Court struck down the amendment as unconstitutional. *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Commw. Ct. 2005), *aff'd at* 906 A.2d 1193 (Pa. 2006).

Pennsylvania's version of the Uniform Contribution Among Tortfeasors Act, 42 Pa. Cons. Stat. Ann.

§§ 8321, *et seq.*, allows general releases, *pro tanto* releases, and *pro rata* releases. *See Buttermore v. Aliquippa Hospital*, 561 A.2d 733 (Pa. 1989); *Wirth v. Miller*, 580 A.2d 1154 (Pa. Super. Ct. 1984); *and Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992). Where a joint tortfeasor pays more than its share of liability "is entitled to recover contribution from defendants who have paid less than their proportionate share." 42 Pa. Cons. Stat. Ann. § 7102(b.1)(4).

"A plaintiff" in West Virginia "may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault . . . Where the plaintiff elects to sue fewer than all of the joint tortfeasors, the named defendants have the right to bring in the other joint tortfeasors based on a right of inchoate contribution." *Kodym v. Frazier*, 186 221, 224-25, 412 S.E.2d 219, 222-23 (1991). "[A] seller who does not contribute to the defect may have an implied indemnity remedy against the manufacturer, when the seller is sued by the user . . . regardless of whether the seller is found liable to the injured party under the theory of strict liability in tort or that of breach of implied warranty of fitness." *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 25-26, 268 S.E2d 296, 300 (1980). "The remedy of implied indemnity is an independent cause of action based primarily on principles of restitution: 'A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in discharge of such liability.'" *Id.* at 27, 268 S.E.2d 301. "[T]he right to seek implied indemnity belongs only to a party who is without fault." *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 47, 459 S.E.2d 151, 158 (1995).

"If a seller in some way contributes to a product defect, the seller and manufacturer are jointly responsible for damages the product causes, and the seller has no right to seek implied indemnity. Instead, because of the shared fault, the rules of contribution would apply. However, the rules of both contribution and indemnity could apply where a seller does not contribute to a defect in a product, but commits an independent act of negligence or is at fault in some other manner." *Dunn*, 194 W. Va. at 47, 459 S.E.2d at 158.

"In a multiparty product liability lawsuit, a good faith settlement between the plaintiff(s) and the manufacturing defendant who is responsible for the defective product will not extinguish the right of a non-settling defendant to seek implied indemnification when the liability of the non-settling defendant is predicated not on its own independent fault or negligence, but on a theory of strict liability." *Dunn*, 194 W. Va. at 47, 459 S.E.2d 158 (1995). "A party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution." *Smith v. Monongahela Power Co.*, 189 W. Va. 237, 242, 429 S.E.2d 643, 648 (1993). "Defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties."

In short, Pennsylvania and West Virginia both recognize joint and several liability, and West Virginia also incorporates an element of fault into its doctrine of contribution among joint tortfeasors. The

laws of the two states are fully compatible on this matter.

F. CONFLICT OF LAWS.

The Court must determine if adjudication in West Virginia would violate the constitutional due process rights of of the potential Pennsylvania plaintiffs. Generally, in matters of conflicts of law, West Virginia applies the venerable doctrine of *lex loci delicti*. Syl Pt. 1, *Paul v. Nat'l Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986). Under that doctrine, "the substantive rights between the parties are determined by the law of the place of injury. *Chemtall*, 216 W. Va. at 451, 607 S.E.2d at 780.

As, explained more fully *supra*, the Court determines that no material conflict exists between the relevant laws of Pennsylvania and West Virginia, so that no constitutional due process problem exists in adjudicating the claims in a West Virginia court. The relevant laws of the two states are substantially similar. Additionally, the Court is capable of applying Pennsylvania laws to the claims of Pennsylvania plaintiffs,[2] and West Virginia laws to the claims of West Virginia plaintiffs, in accordance with West Virginia's conflicts of law principles.

G. CONCLUSIONS.

After conducting a thorough analysis of the laws of the State of Pennsylvania, this Court finds that West Virginia law does not conflict with Pennsylvania law

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[2] Indeed, in his concurrence with the Supreme Court's remand of this case, Justice Starcher suggested that even different standards of proof could be applied to the same evidence by a jury in this case. *Stern*, 216 W. Va. 443, 459, fn.4, 607 S.E.2d 772, 788 (Starcher, J., concurring).

on strict liability, medical monitoring, punitive damages, statute of limitations, and relevant tort defenses in any way so material as to render the claims of plaintiffs from both jurisdictions incompatible with West Virginia law, or to render adjudication in a West Virginia court unfair to any parties. Specifically, the legal requirements for each element of these claims are substantially similar in both jurisdictions, as set forth above. Further, Pennsylvania's medical monitoring cause of action is reasonably co-extensive with the medical monitoring causes of action in West Virginia. Additionally, the defenses available under the laws of both Pennsylvania and West Virginia are similar overall. A jury will be fully capable of deciding the case with the help of proper instructions to address any dissimilarities. To the extent that differences exist between the relevant laws of West Virginia and Pennsylvania, such differences do not rise to the level of materiality, and do not make adjudication in West Virginia arbitrary or fundamentally unfair.

II.

CASE MANAGEMENT

Counsel for the *Stern* Plaintiffs, counsel for Defendants, Cytec Industries Inc., G. E. Betz, Chemtall, Inc., Stockhausen, Inc., Ondeo Nalco Company, Ciba Specialty Chemicals Corporation, and distributors, Hychem, Inc., and Zinkan Enterprises (hereinafter "Chemical Company Defendants"), filed proposed Case Management Orders (hereinafter "CMO"). Counsel for Zinkan Enterprises originally filed a separate proposed Case Management Order, but asked that that Order not be considered by the Court. Intervenors, Franklin Stump, Danny Gunnoe and Teddy Joe Hoosier (the current status of whom is challenged

by the Defendants),[1] filed a response to the proposed CMO's of the various parties, indicating agreement with the CMO submitted by the *Stern* Plaintiffs and objecting to the other proposed CMO's. The Chemical Company Defendants filed a response to the *Stern* Plaintiffs' CMO in addition to filing their own CMO proposal and filed a response to the Intervenors' proposal. The proposals, written replies and responses to various proposals heretofore filed were reviewed by the Court prior to the hearing.

On July 7, 2006, oral argument was presented by the *Stern* Plaintiffs' counsel, Chemical Company Defendants' counsel, counsel for the Coal Company Defendants and counsel for the Intervenors on the various CMO proposals.

The *Stern* Plaintiffs proposed establishing a CMO which bifurcates the issues of product defect and punitive damages, if applicable, from class certification and medical monitoring. The Court is advised that some Defendants initially agreed with this method. *Stern* Plaintiffs argue that if they are unable to prove that the chemical Defendants' products are defective, then the case is resolved. If the products are found to be defective, then the case would proceed on class certification and medical monitoring issues. *Stern* Plaintiffs principally rely upon *McFoy v. Amerigas, Inc.*, 70 W.Va. 526, 295 S.E.2d 16 (1982) for support.

The Chemical Defendants propose that the Court address the class certification issues first. They argue that the class issues are intertwined and related to the medical monitoring issues. Chemical Defendants

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[1] That issue has been resolved by order of this Court of even date herewith.

rely principally upon *In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003) and argue that *McFoy* is the exception and not the rule.

Counsel for the Intervenors agree with the *Stern* Plaintiffs' proposed method of managing these cases.

In addressing when class certification should be determined, the West Virginia Supreme Court of Appeals provided:

> This is not to say, however, that Rule 23 mandates that a circuit court in every case must fully certify a class before proceeding to a consideration of the merits. In *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 295 S.E.2d 16 (1982), we examined a situation where the circuit court granted summary judgment on liability against a defendant, and then certified a class action on behalf of a class of plaintiffs. We approved of this procedure, stating:
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> Where the factual circumstances of a case make it appropriate to determine liability before determining the class of plaintiffs, it is within the court's discretion to do so.
>
> The applicable requirement under the Federal Rules is that determination of class standing be made "as soon as practicable after the commencement of the action," Rule 23(c)(1), Fed.R.Civ.P. (1966). The Third Circuit, Sixth Circuit and District of Columbia Circuit have all allowed the trial court to make its class action determination at the entry of final judgment, or after. *McLaughlin v. Wohlgemuth*, 535 F.2d 251 (3rd Cir., 1976); *Larionoff v. U.S.*, 175 U.S.App.D.C. 32, 533 F.2d 1167 (1976) *aff'd*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *Alexander v.*

> *Aero Lodge No. 735, Int'l. Ass'n. of Machinists and Aerospace Workers, AFL-CIO*, 565 F.2d 1364 (6th Cir., 1977), *cert. denied,* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978). We find this flexibility reasonable so long as the defendant is aware that a determination of class action standing is a distinct possibility. . . . This decision is in harmony with the Third Circuit's tactic in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (1974) (*en banc*), *cert. denied*, 419 U.S.885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974) that permitted plaintiffs to proceed in a test case and move, if successful, for later consideration of class certification, and also with the general federal practice that permits plaintiffs to "amend up" to a class complaint.
>
> [McFoy,] 170 W.Va. at 531, 295 S.E.2d at 21-22.

In re West Virginia Rezulin Litigation, supra at 63, n 7.

The Court has been given express authority to adopt judicial management procedures for the orderly and efficient disposition of these cases. "We leave any additional concerns of the parties to the Circuit Court of Marshall County to reconsider in light of this decision as we believe that the Circuit Court is in a better position to manage this litigation and to protect the interests of both the *Pettry* and *Stern* litigants. The Circuit Judge should manage the cases and the issues herein as he deems appropriate." *Stern, et al. v. Chemtall Incorporated, et al.*, 217 W.Va. at 338, 617 S.E.2d at 885.

Pettry was filed in 2002 and *Stern* in 2003. The Court finds bifurcating the issues of product defect and punitive damages, if applicable, from class certification and medical monitoring is an orderly and

efficient manner of disposing of these matters and protecting the interests of the parties. Therefore, the issues of liability and punitive damages will be bifurcated from medical monitoring and class certification issues.

1. Bifurcation of Liability and Punitive Damages Multiplier. The first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant. Specifically, the following issues will be tried in the first phase of the trial.

a. Whether the Defendants, or any of them, had actual or constructive knowledge of the hazard posed by their acrylamide-containing products.

b. Whether or not the state of the medical, scientific, and industry knowledge throughout the time of Plaintiffs' exposure was such that Defendants, or any of them, could have reasonably foreseen that persons working with and around acrylamide-containing were at risk to sustain injury as a result of exposure to said products.

c. Whether or not Defendants, or any of them, failed to properly test their products.

d. Whether or not Defendants, or any of them, manufactured, processed, sold, and/or distributed unreasonably dangerous products.

e. Whether or not Defendants, or any of them, failed to adequately warn the Plaintiffs of the inherent dangers, if any, in their products.

f. Whether one or more of the Defendants failed to recommend and/or provide protective devices for use with its acrylamide-containing products.

g. Whether or not Defendants, or any of them, failed to provide instructions to foreseeable users of proper methods of handling of acrylamide-containing products.

h. Whether or not Defendants, or any of them, breached any continuing duty to warn Plaintiffs.

i. Whether or not the acrylamide-containing products manufactured and sold by the Defendants, or any of them, were not reasonably safe (strict liability in tort) as manufactured or marketed.

j. Whether or not the Defendants, or any of them, acted in such a manner as to justify punitive damages.

k. If any Defendants' actions or inactions were of such a nature as to justify punitive damages, what multiple of general damages would suffice as a deterrent of future actions against that particular Defendant.

2. Causation and Damages. Should Plaintiffs prevail on the issue of liability, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.

3. Timing for Discovery and Pretrial Matters. The following shall be established and observed as to discovery and other activity in this matter up through and including the first phase of the trial by a jury.

a. February 1, 2007: Plaintiffs shall serve a list of proposed fact witnesses.

b. March 3, 2007: Defendants shall serve a list of proposed fact witnesses.

c. April 3, 2007: Plaintiffs shall designate all liability and punitive damages expert witnesses and provide Rule 26(b) information.

d. May 5, 2007: Defendants shall designate all liability and punitive damages expert witnesses and provide complete Rule 26(b) information as to each expert designated.

e. Sepember 1, 2007: The parties will exchange witness and exhibit lists for trial.

f. September 30, 2007: All discovery shall be completed.

g. October 15, 2007: All dispositive motions, *Daubert / Wilt* motions in limine, summary judgment motions, or other pretrial motions, with supporting memoranda shall be filed. This provision should not be construed to prohibit the filing of any dispositive or other motions at any earlier point in time. In the event of such filing, responses will be due in the time provided by the Rules.

h. October 29, 2007: Non-movants shall respond with supporting memoranda to any dispositive or other pretrial motions.

i. November 5, 2007: Replies to any such motions shall be filed.

j. November 15, 2007 at 1:30 p.m.: A hearing on all dispositive or other pretrial motions will be held, if appropriate.

k. November 26, 2007 at 10:00 a.m.l: Pretrial Conference. All parties are directed to exchange and deliver their respective pre-trial conference memo-

randa to the Court's Marshall County Office, with a courtesy copy for the Court, *no later than seven (7) days preceding* the conference. Said memoranda are to include at a minimum the following:

(1) Statement of the Case
(2) Issues of Fact
(3) Issues of Law
(4) Proposed Stipulations
(5) List of Witnesses
(6) Pending Motions

At the time of the Pretrial Conference the Court will determine when exhibits, *voir dire* questions, jury instructions, and any remaining motions in *limine* are to be filed by the parties.

l. December 3, 2007: First Phase of Trial begins.

4. Modification. In accordance with W.Va.R.Civ.P. 16(b), this Memorandum Order shall not be modified except by leave of the Court.

5. Sanctions. In accordance with W.Va.R.Civ.P. 16(f), the Court will impose the full spectrum of sanctions authorized by W.Va.R.Civ.P. if a party or party's counsel fails to obey this Order or other Orders or Rules of this Court.

6. Unless authorized by the Court the above dates are final.

7. Production of Documents. Unless otherwise agreed, when the parties are required to produce documents in response to discovery pleadings or for any other reason, they shall produce copies (via either paper copies, computer disk or other electronic means) of each document to all counsel of record, in both matters.

8. Preservation of Documents. During the pendency of this litigation, until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody or control, including computer-generated and stored information and materials such as computerized data and electronic mail, containing information that is materially relevant to the subject matter of the pending litigation.

9. Communications Among Counsel. The Court recognizes that cooperation by and among counsel is essential for the orderly and expeditious resolution of this litigation. Accordingly, communications and information sharing among and between counsel for Plaintiffs and counsel for Defendants is encouraged, and shall not be deemed a waiver of the attorney-client privilege, attorney work-product privilege, or any other privilege. Any and all joint defense and joint prosecution agreements, in either *Stern* or *Pettry,* are hereby recognized and approved.

10. Protective Order. The protective orders governing production of materials in discovery previously entered into in either *Pettry* or *Stern* are deemed to be continuing and in effect; parties in these matters shall seek to add signatories to such agreements as necessary to allow all parties in either *Stern* or *Pettry* access/use of the material governed by such orders.

It is so ORDERED.

The Clerk shall transmit a copy of this memorandom order to all counsel of record.

Dated: this 9th day of January, 2007.

/s/ John T. Madden
JOHN T. MADDEN, JUDGE

A Copy Teste:

David R. Ealy, Clerk
By [Illegible] Deputy

APPENDIX C

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

[Filed March 5, 2003]

Civil Action No.03-C-49m

WILLIAM K. STERN, LEONARD A. SNYDER, MICHAEL CAPUTO, TERRY TUCKER, MICHAEL E. ROMADA, RODNEY FERRELL, WILLIAM THOMAS ADKINS, II, JONATHAN PAUL SPENCER and JOHN DOE,

Plaintiffs,

v.

CHEMTALL INCORPORATED, A Georgia Corporation; CIBA SPECIALTY CHEMICALS CORPORATION, A Delaware Corporation; CYTEC INDUSTRIES, INC., A Delaware Corporation; G. E. BETZ, INC., A Pennsylvanian Corporation; HYCHEM, INC., A Florida Corporation; ONDEO NALCO COMPANY, A Delaware Corporation; STOCKHAUSEN, INC., A North Carolina Corporation; ZINKAN ENTERPRISES, INC., An Ohio Corporation; JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY; JOHN CESLOVNIK; ROBERT MCKINLEY; EULIS DANIELS; JOHN DOE COMPANY REPRESENTATIVES for CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G. E. BETZ., INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., and ZINKAN ENTERPRISES, INC.,

Defendants.

CLASS ACTION COMPLAINT

This action is brought pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, as a class

action on behalf of the named Plaintiffs for themselves, and all other members of the Classes herein described:

NATURE OF THE ACTION

Plaintiffs bring this action as a class action on behalf of a Class consisting of themselves and all other persons who have worked in coal preparation plants and who have had inhalation, ingestion and/or dermal exposure to polyacrylamide flocculant with residual acrylamide monomer or who are the offspring of persons who have worked in coal preparation plants who have had inhalation, ingestion and/or dermal exposure to polyacrylamide flocculant with residual acrylamide monomer. Plaintiffs seek to recover damages caused to the Class by Defendants' violation of the applicable law.

THE PARTIES

PLAINTIFFS

1. Plaintiff, William K. Stern, is a citizen of and is domiciled in Marshall County, West Virginia. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Marshall County, West Virginia.

2. Plaintiff, Leonard A. Snyder, is a citizen of and is domiciled in Belmont County, Ohio. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Marshall County, West Virginia.

3. Plaintiff, Michael Caputo, is a citizen of and is domiciled in Marion County, West Virginia. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Monongalia County, West Virginia.

4. Plaintiff, Terry Tucker, is a citizen of and is domiciled in Raleigh County, West Virginia. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Raleigh County, West Virginia.

5. Plaintiff, Michael E. Romada, is a citizen of and is domiciled in Belmont County, Ohio. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Marshall County, West Virginia.

6. Plaintiff, Rodney Ferrell, is a citizen of and is domiciled in Boone County, West Virginia. Said Plaintiff was/is employed by and worked in a coal preparation facility located in Boone County, West Virginia.

7. Plaintiff, William Thomas Adkins, II, is a citizen of and is domiciled in Lincoln County, West Virginia. Said Plaintiff is the child of a miner in a coal preparation facility in West Virginia.

8. Plaintiff, Jonathan Paul Spencer, is a citizen of and is domiciled in Boone County, West Virginia. Said Plaintiff is the child of a miner in a coal preparation facility in West Virginia.

9. Plaintiff, John Doe, is a person not yet known who is/was significantly exposed to polyacrylamide flocculant containing acrylamide monomer in a coal preparation plant and who is representative of persons set forth in paragraphs 27(e) and 27(f).

DEFENDANTS

10. Defendant, Chemtall, incorporated ("Chemtall"), is a Georgia corporation with its principal place of business in Riceboro, Georgia. Chemtall manufactured supplied, re-sold and/or distributed chemicals

for use in coal preparation plants in West Virginia and other states.

11. Defendant, CIBA Specialty Chemicals Corporation ("CIBA"), successor in interest to Allied Colloids, Inc., is a Delaware corporation with its principal place of business in Tarrytown, New York. Allied and CIBA, as its successor in interest, manufactured, supplied, re-sold and/or distributed chemicals for use in coal preparation plants in West Virginia and other states.

12. Defendant, Cytec Industries, Inc. ("Cytec"), successor in interest to American Cyanamid, is a Delaware corporation with its principal place of business in West Patterson, New Jersey. Cytec and American Cyanamid manufactured, supplied, re-sold and/or distributed chemicals for use in coal preparation plants in West Virginia and other states. Upon information and belief, Cytec maintains places of business in Pleasants County and Kanawha County, West Virginia.

13. Defendant, G. E. Betz, Inc. ("Betz"), a successor in interest to Betzdearbom, Inc., is a Pennsylvania corporation with its principal place of business in Trevose, Pennsylvania. Betz and Betzdearbom, Inc. manufactured, supplied, re-sold and/or distributed chemicals for use in coal preparation plants in West Virginia and other states. Upon information and belief, Betz maintains a place of business at Weirton, Hancock County, West Virginia.

14. Defendant, Hychem, Inc., ("Hychem"), is a Florida corporation with its principal place of business in Lockport, New York. Hychem manufactured, supplied, re-sold and/or distributed chemicals for use

in the coal preparation plants in West Virginia and other states.

15. Defendant, Ondeo Nalco Company ("Nalco"), is a Delaware corporation with its principal place of business in Naperville, Illinois. Nalco manufactured, supplied, re-sold and/or distributed chemicals for use in coal preparation plants in West Virginia and other states. Upon information and belief, Nalco maintains a place of business in Kanawha County, West Virginia.

16. Defendant, Stockhausen, Inc. ("Stockhausen"), is a North Carolina corporation with its principal place of business in Greensboro, North Carolina. Stockhausen manufactured, supplied, resold and/or distributed chemicals for use in coal preparation plants in West Virginia and other states.

17. Defendant, Zinkan Enterprises, Inc., ("Zinkan"), successor in interest to O'Brien Industries, Inc., is an Ohio corporation with its principal place of business in Twinsburg, Ohio. O'Brien and Zinkan, as its successor in interest, manufactured, supplied, re-sold and/or distributed chemicals for use in the coal preparation plants in West Virginia and other states. Upon information and belief, Zinkan maintains manufacturing and/or distributing facilities in Harrison Courity and Kanawha County, West Virginia.

18. Defendant, John Doe Manufacturing and Distributing Company ("John Doe Manufacturing"), is a corporation or corporations not yet known to the Plaintiffs which manufacture, supply, re-sell and/or distribute potyacrylamide containing products with acrylamide monomer for use in coal preparation plants in West Virginia and other states.

19. The Defendants herein named in paragraphs 10 thru 18 hereinafter will be collectively referred to as "Defendant Chemical Companies".

20. Defendant, John Ceslovnik, is a Citizen of West Virginia domiciled in Nicholas County. Said Defendant is/was an employee, agent and representative of Defendant Nalco and, in said capacity, sold and distributed chemicals for and on behalf of Defendant Nalco for use in coal preparation plants in West Virginia.

21. Defendant, Robert McKinley, is a Citizen of West Virginia domiciled in Harrison County. Said Defendant is/was an employee, agent and representative of Defendant Nalco and, in said capacity, sold and distributed chemicals for and on behalf of Defendant Nalco for use in coal preparation plants in West Virginia.

22. Defendant, Eulis Daniels, is a Citizen of West Virginia domiciled in Mercer County. Said Defendant is/was an employee, agent and representative of Defendant Nalco and, in said capacity, sold and distributed chemicals for and on behalf of Defendant Nalco for use in coal preparation plants in West Virginia.

23. Defendants, John Doe Company Representatives ("John Doe Representatives") are/were employees, agents and representatives of Defendants Chemtall Incorporated, CIBA Specialty Chemicals Corporation, Cytec Industries, Inc., G. E. Betz, Inc., Hychem, Inc., Ondeo Nalco Company, Stockhausen, Inc., and/or Zinkan Enterprises, Inc. and in said capacities sold and distributed chemicals for and on behalf of Defendants Chemtall incorporated, CIBA Specialty Chemicals Corporation, Cytec Industries, Inc., G. E. Betz, Inc., Hychem, Inc., Ondeo Nalco Company,

Stockhausen, Inc., and/or Zinkan Enterprises, Inc. for use in coal preparation plants in West Virginia, and are not yet known to Plaintiffs.

24. The Defendants herein named in paragraphs 20 thru 23 will be hereinafter collectively referred to as "Defendant Chemical Company Representatives".

JURISDICTION AND VENUE

25. Jurisdiction is proper in this matter because some of the Plaintiffs are citizens of and domiciled in West Virginia and Ohio and have worked in West Virginia coal preparation plants. The amount in controversy satisfies the minimum jurisdictional amount. The claims herein are brought solely under West Virginia and other applicable State common and State statutory laws.

The Federal Courts lack subject matter jurisdiction over this action, as there is no Federal question and as there is incomplete diversity of citizenship due to the presence of both plaintiffs who are domiciled in and are citizens of Ohio (who worked in a West Virginia coat preparation plant) and a defendant Ohio corporation. Furthermore, Defendant Chemical Company Representatives (as named above) are domiciled in and are citizens of West Virginia. Removal is improper. Every claim arising under the Constitution, treaties, or laws of the United States is expressly disclaimed (including any claim arising from any act or omission on a federal enclave, or any officer of the United States, or any agency or person acting under him occurring under color of such office). The Plaintiffs and the Classes they seek to represent withdraw any asserted State claim that is pre-empted by Federal law.

26. Venue is appropriate in Marshall County because, upon information and belief, some or all of said Defendants conduct business in Marshall County, West Virginia.

CLASS ACTION ALLEGATIONS

27. Plaintiffs bring this class action pursuant to West Virginia Rules of Civil Procedure 23(a) and (b) on behalf of themselves and all other persons or entities similarly situated in the Classes (the "Classes") consisting of:

(a) All persons who have worked in coal preparation plants in West Virginia and who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at significantly increased risk for sensory or autonomic nervous system deficits as a result of the exposure.

(b) All persons who have worked in coal preparation plants in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia, and who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at significantly increased risk for sensory or autonomic nervous system deficits as a result of the exposure.

(c) All persons who have worked in coal preparation plants in West Virginia and who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at increased risk for cancer, including but not limited to cancer of the scrotum/testicles,

adrenal gland, mammary gland, uterus, thyroid, pancreas, brain, spinal cord, lungs and/or Hodgkin's Disease, as a result of the exposure.

(d) All persons who have worked in coal preparation plants West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia, and who have had significant inhalation, ingestion, and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at increased risk for cancer, including but not limited to, cancer of the scrotum/testicles, adrenal gland, mammary gland, uterus, thyroid, pancreas, brain, spinal cord, lungs and/or Hodgkin's Disease, as a result of the exposure.

(e) All persons who have worked in coal preparation plants in West Virginia and who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acylamide monomer and who are at increased risk for developing genetic abnormalities and/or genetic diseases including, but not limited to, reproductive, fertility and developmental aberrations, as a result of the exposure.

(f) All persons who have worked in coal preparation plants in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia, and who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at increased risk for developing genetic abnormalities and/or genetic diseases including, but not limited to, reproductive, fer-

tility and developmental aberrations, as a result of the exposure.

(g) The offspring of persons who have worked in coal preparation plants in West Virginia who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at increased risk for developing genetic abnormalities and/or genetic diseases including, but not limited to, reproductive, fertility and developmental aberrations, as a result of the exposure of the parent coal preparation plant worker.

(h) The offspring of persons who have worked in coal preparation plants in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia, who have had significant inhalation, ingestion and/or dermal exposure to polyacrylamide flocculants with residual acrylamide monomer and who are at increased risk for developing genetic abnormalities and/or genetic diseases including, but not limited to, reproductive, fertility and developmental aberrations, as a result of the exposure of the parent coal preparation plant worker.

28. The persons constituting the Classes are so numerous as to make it impracticable to bring all before the Court.

29. Plaintiffs' claims are typical of the claims of the Classes with respect to the Class-wide relief sought. Common relief is sought for the Classes, including monitoring of adverse medical conditions associated with exposure to polyacrylamide and the acrylamide monomer, as well as punitive damages.

30. Plaintiffs, with the association of counsel, will fairly insure the adequate representation of members of the Classes.

31. A class action is superior to other applicable methods 14 the fair and efficient adjudication of the present controversy.

32. Defendants have acted on grounds generally applicable to the Classes, thereby making appropriate final relief with respect to the Classes as a whole.

33. Questions of law and fact common to the members of the Classes predominate over any questions affecting only individual members.

34. There are substantial common questions of law and fact affecting the Class members several rights, including, but not limited to, questions concerning:

(a) Whether the polyacrylamide flocculent with acrylamide monomer designed, manufactured, packaged, inspected, marketed and/or sold by Defendant Chemical Companies and their agents, servants, and employees, including but not limited to Defendant Chemical Company Representatives, was in a defective condition unreasonably dangerous to the user of the chemical product.

(b) Whether the Classes are entitled to medical monitoring.

(c) Whether the Classes are entitled to punitive damages.

(d) Such other factual and legal issues as are apparent from the allegations and causes of action alleged above.

SUBSTANTIVE ALLEGATIONS

A. Polyacrylamide with Residual Acrylamide Monomer

35. Coal mines generate large volumes of wash water in processing coal. The water combines with clay and other non-coal materials to make up the tailings. The tailings are thickened with the aid of coagulants and flocculants in a static clarifier or thickener. The water is recycled and the thickened tailings are piped to a large impoundment area where further settling occurs. Clarified water is then generally reused by the coal preparation plant.

36. During the coal preparation process, polyacrylamide is used as a flocculent and separator. It is added repeatedly to accelerate the settling of the coagulated solids from recirculated water used to process coal.

37. Polyacrylamide is a polymer which contains the acrylamide monomer. Polyacrylamides are high molecular weight homopolymers of acrylamide (nonionic polyacrylamides), copolymers of acrylamide and acrylic acid (anionic polyacrylamides), or copolymers of acrylamide and one of several possible cationic monomers (cationic polyacrylamides). When heated above 120°F acrylamide polymerizes into polyacrylamide, an insoluble gel.

38. It has been known since the 1960's that residual amounts of acrylamide monomer are present in the polyacrylamide flocculant product.

39. In 1964, the Biochemical Research Laboratory of the Dow Chemical Company published "Toxicology of Acrylamide", wherein it stated the following:

> The general rule for industrial handling is to prevent essentially all contact with acrylamide or its solutions, whether by ingestion, inhalation, or skin contact. It is the authors' opinion that the summation of all industrial exposures should be so controlled that it would be practically impossible for a workman to absorb more than 0.05 mg kg day of acrylamide on a day-to-day basis. . . . In considering applications or uses whereby the general public might be exposed to acrylamide on a day-to-day basis it is recommended that total absorption should not exceed 0.0005 mg kg day. This provides a large margin of safety (1000-fold), but such a margin seems justified on the basis of the serious consequences of over-exposure.

40. In 1966, the then Ministry of Housing and Local Government in the United Kingdom set up a standing committee on New Chemicals for Water Treatment to address the suitability of new water treatment chemicals, including acrylamide polymers and co-polymers, for use in potable water treatment. Because the Committee was concerned with the chronic toxicity of residual acrylamide monomer from the use of polyacrylamide in water treatment, it established limits on the amount of acrylamide monomer that could be contained in polyacrylamide. These limits were established even though, at the time, there were no analytical methods which could detect low levels of acrylamide in water. Work was then undertaken to develop a suitable technique so that the behavior of acrylamide in water systems could be investigated.

41. In 1967, the American Conference of Governmental industrial Hygienists ("ACGIH") estab-

lished a Threshold Limit Value ("TLV") of 0.3 milligrams of acrylamide per cubic meter of air (mg/m^3) for exposure over an eight-hour day.

42. In [or about] 1967, the United States Food and Drug Administration promulgated a regulation limiting the amount of residual acrylamide monomer used in connection with manufacturing, packing, processing, preparing or holding food.

43. In 1971, the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") adopted and promulgated the 0.3 mg/m^3 TLV as a Permissible Exposure Limit ("PEL") in 29 CFR § 1910/1000.

44. In 1972, a method of determining the residual acrylamide monomer in water at levels likely to arise from use of acrylamide polymers was published by B. T. Croll and G. M. Simkins. The method involved bromination at pH 1.0, pre-extraction at pH 1.0, extraction at pH 3.0 and concentration of the extraction prior to analysis by electron-capture gas chromatography. The limit of detection was 0.1 ugl-1.

45. A further study by B. T. Croll of the residual acrylamide monomer in polyacrylamide was published in 1973. Croll concluded that

> [t]he use of polymers of uncontrolled monomer content, or the use of higher doses than those recommended, could, however, represent a potential hazard as acrylamide passes through normal water treatment processes. Similarly, effluents from sludge conditioning and from other industries using polyacrylamide [i.e. the settling of solids from coal and gravel process water] could present a hazard to consumers whose water is drawn downstream of these effluents.

46. A symposium on the manufacture and quality control of chemicals used in water clarification held was on May 8, 1974. A paper titled, "Manufacture and Quality Control of Synthetic Flocculants" was presented by E. Rothwell from Allied Colloids, Ltd. Mr. Rothwell stated that

> as is the case with many chemical reactions, it is a matter of some difficulty to cause the polymerization reaction to proceed to 100% completion. Accordingly, there is often a residue of up to 4% of unwanted unpolymerized physiologically active monomers in the solution or gel of the polymer at the end of the polymerization stage,

Mr. Rothwell also noted:

> In 1967, however, when polyacrylamides were getting serious consideration in the UK as waterworks flocculants aids, relatively few of the then commercially available polymers were considered satisfactory with regard to residual monomer content by the Dunlop Committee.

47. In October 1976, the National institute of Occupational Safety and Health ("NIOSH") issued Publication NO. 77-112 entitled "Criteria for a Recommended Standard: Occupational Exposure to Acrylamide." Robert M. Clyne, M.D., Corporate Medical Director, American Cyanamid Company, was a review consultant for this publication. In this publication, recommendations were made for an acrylamide standard regarding, *inter alia*, workplace air sampling and analysis, medical surveillance of persons subject to occupational exposure to acrylamide, labeling and warning signs for containers of acrylamide, personal protective clothing and equipment, hazardous com-

munication, workplace practices, sanitation, and monitoring and record keeping of persons so exposed. NIOSH recommended retention of the existing OSHA PEL of 0.3 mg/m^3.

48. In 1978, two chemists from The Dow Chemical Company recognized that the amount of acrylamide monomer in polyacrylamide needed to be determined in order to insure safety in using polyacrylamide. They developed sensitive and specific methods of measuring the residual acrylamide monomer in polyacrylamide.

49. In May 1979, the Office of Toxic Substances, United States Environmental Protection Agency issued an *Assessment Of The Need For, And Character Of, Limitations On Acrylamide And Its Components*. Much of the information for this report was provided by several manufacturers and Defendants, and/or their predecessors herein, and users of acrylamide including, but not limited to, American Cyanamid Company, Dow Chemical Company, 3M Company, Carborundum Corporation, Rhone-Poulenc, Halliburton Services, Nalco Chemical Company, Avanti International, Calgon Corporation, and Proctor Chemical Company. This report stated that "[t]he primary concern with polyacrylamide is the residual monomer present in these products which would be released during use of the polymers in water treatment." The report further states "[t]he potential for discharge of monomer laden waters from portable coal washing plants upstream from potable water intake lines in the Appalachian Region may be sufficient to represent a human health hazard."

50. In 1985, an International Programme on Chemical Safety ("IPCS") was held in Geneva, Switzerland. The IPCS was a joint venture of the United

Nations Environment Programme, the International Labour Organization and the World Health Organization. The main objective of the IPCS was to carry out and disseminate evaluations of the effect of chemicals on human health and the quality of the environment. The IPCS published an Environmental Health Criteria for Acrylamide. The IPCS notes, inter alia, that "[c]ommercial polyacrylamide contains 0.05 - 5.0% acrylamide."

B. Since the Early 1950's Acrylamide has been known as a Neurotoxin which Affects the Central, Peripheral and Autonomic Nervous Systems

51. The acrylamide monomer is toxic and is an irritant. Cases of acrylamide poisoning show signs and symptoms of local effects due to irritation of the skin and mucous membranes and systemic effects due to the involvement of the central, peripheral and autonomic nervous systems.

52. The neurotoxicity of acrylamide has been recognized since the early 1950's during toxicologic studies prompted by the advent of large-scale production of acrylamide for the polymer industry. Within five (5) months of commencing manufacture of acrylamide, several factory workers developed a peripheral neuropathy strikingly similar to neurologic signs previously noted in animals chronically intoxicated with acrylamide.

53. The earliest published study on the effects of acrylamide on the central nervous system were published in 1958. This study concluded, *inter alia*, that

> the chronic administration of acrylamide to a wide variety of animal species produces unusual

> and similar neurotoxic manifestations, the nature of which depend on rate of administration and the magnitude of dosage. A chronic syndrome not unlike that of cerebellar deficit results from the repeated administration of a small dose [of acrylamide].

54. In 1969, the American Cyanamid Company, Process Chemicals Department, published, "Chemistry of Acrylamide wherein it provided:

> Acrylamide may be absorbed into the body by passage through the intact skin, by inhalation of air containing dust or droplets of solutions of the material, or by swallowing. . . . Small, single doses of acrylamide are not hazardous (the acute oral LD_{50} for rats is about 200 mg/kg), and health experience in manufacture of the product has been good. *However, animal tests have shown that it possesses a high degree of cumulative toxicity*. Repeated administration of small doses to experimental animals results in a disturbance of cerlain functions of the nervous system. . . . *It is recommended that exposure of humans to acrylamide be avoided to the maximum extent reasonably possible. Persons working with acrylamide should wear long-sleeved coveralls and impervious gloves (rubber or plastic) and rubber footwear. Gloves contaminated on the inside should be discarded. Under conditions of dusting or misting, a respirator and goggles should be used. Fresh work clothing should be worn daily. Work clothing should not be worn home. Spills of acrylamide solution or accumulations of dust on the skin should be removed promptly by washing with plenty of water. If clothing becomes contaminated, it*

> *should be removed promptly. Food, beverages, candy, tobacco, etc., should be not be carried on the person when working with acrylamide and these items should not be stored in the work area. Hands should be washed thoroughly before eating or smoking and at the end of the work day. Care should be taken to avoid creating dust when solid acrylamide is handled. Spills of solution should be cleaned up promptly so that they do not lead to dustiness when they have dried.*

(Emphasis added).

C. Acrylamide is a Carcinogen

55. Acrylamide is a probable human carcinogen based on sufficient evidence of carcinogenicity in experimental animals.

56. Prior to 1984, the chemical industry sponsored a study on acrylamide monomer toxicity and oncogenicity. In this study, a group of male and female mice were administered varying doses of acrylamide by intraperitoneal injection three (3) times per week for eight (8) weeks. Dose related increases in the incidence of lung tumors were seen in both sexes. Similar results were obtained in mice given oral doses of varying amounts of acrylamide three (3) times per week for eight (8) weeks.

57. In November 1984, Dow Chemical produced a document titled: "Recent Acrylamide Monomer Toxicity Data and Its Importance to You The Polyacrylamide Customer." In it, Dow provided information on, among other things, the recent completion of a lifetime rat study" that was designed to assess the effects of prolonged exposure to acrylamide monomer. Dow stated that

> the new data indicated that acrylamide monomer produced a modest increase in a variety of tumors during the latter stage of the rats' life cycle.

Further, based on this study, Dow adopted a revised Industrial Hygiene Guide ("IHG") lowering the Threshold Limit Value from 0.3 mg/m^3 (established in 1967 by the American Conference of Government Industrial Hygienists) to "0.03 mg/m^3, Skin" for both inhalation and dermal exposure. Dow's stated that its

> 'skin' notation with the IGH indicates that this material can be absorbed through the skin in amounts sufficient to cause toxic effects. Although the IGH is for inhalation exposures, skin contact with this material can contribute to the overall exposure. *Skin contact with acrylamide monomer must be avoided.*

(Emphasis added.)

58. On November 20, 1984, F. P. Frauson, Jr., Product Marketing Manager in the Specialty Chemicals Department at Dow Chemical, sent a letter to Dow's customers of polyacrylamide. The letter stated

> Attached is the brochure entitled "Recent Acrylamide Monomer Toxicity Data and its Importance To You the Polyacrylamide Customer November 1984". Dow produced this brochure to provide additional information regarding the recently completed industry-sponsored acrylamide monomer toxicity-oncogenicity study. This brochure includes information on how the data from this study was interpreted by Dow toxicological, industrial hygiene and medical professional in relation to you our polyacrylamide cus-

tomer. If you have additional questions please call:
F. Peter Frauson, Jr. 517-636-1727
Lorraine Kroposki 517-636-1238

59. In 1986, a two (2) year study was conducted with groups of 90 male and 90 female F-344 rats to determine whether varying doses of acrylamide in drinking water affected the incidence of cancer. Even though none of the tumor types showed a clear dose response relationship, the results revealed an increased incidence of tumors in the mammary and clitoral glands, uterus, testes, brain and spinal cord, adrenal, pituitary, thyroid and oral cavity.

60. According to the California Safe Drinking Water and Toxic Enforcement Act of 1986, acrylamide is a chemical known to cause cancer.

61. On April 4, 1986, Hercules Incorporated issued a Material Safety Data Sheet for Hercofloc 818 PWG; RETEN 421 PWG, Synthetic Water-Soluble polymers. It stated: "Acrylamide Monomer has been given an A2 notation, 'Suspect of Carcinogenic Potential for Man' by the ACGIH."

62. On March 31, 1989, Neutron Products Inc., issued Material Safety Data Sheets for Photafloc 1134, 1134-PH and 1110. It stated: "Acrylamide, present as a residual monomer, has been given an A2 notation 'Suspected of carcinogenic potential for man', by the ACGIH."

63. On June 26, 1990, Hercules Incorporated issued a Material Safety Data Sheet for Hercofloc 831, Synthetic Water Polymer. It provided: "THE RESIDUAL ACRYLAMIDE MONOMER HAS BEEN GIVEN AN A2 NOTATION, 'SUSPECT OF CAR-

CINOGENIC POTENTIAL FOR MAN' BY THE ACGIH."

64. The National Toxicology Program at the United States Department of Health and Human Services listed acrylamide as a Category 2A Carcinogen in its Sixth Annual Report on Carcinogens in 1991. A Category 2A is a "probable" human carcinogen.

65. Another study of F-344 rats was conducted in 1995 to further determine whether varying doses of acrylamide in drinking water affected the incidence of cancer. The two (2) year study revealed an increased incidence of tumors in the brain and spinal cord, mammary glands, scrotum and thyroid. Clear dose response relationships were seen with thyroid adenomas in both sexes, thyroid adenocarcinomas, mammary gland fibroadenomas, and brain meningiomas/reticulosis in females and scrotal mesotheliomas.

66. There is overwhelming evidence at the cellular level that humans do not differ qualitatively from experimental animals in their response to carcinogens. It is widely accepted in the scientific community that in the absence of adequate data on humans, it is biologically plausible and prudent to regard agents and mixtures for which there is sufficient evidence for carcinogenicity in experimental animals as if they presented a carcinogenic risk to humans.

67. In 1996, the Acrylamide Monomer Producers Association, Inc. was formed and subsequently incorporated in the District of Columbia, for North American and European producers of acrylamide monomer to "address technical and regulatory issues of mutual interest." Members have included Defendants CIBA, Nalco and Cytec, among others. Prior to

the formation of the aforesaid group, Dow Chemical USA, Standard Oil Company and Nalco Chemical Company, among others, were members of the Acrylamide Producers Association, special projects group" of the Synthetic Organic Chemical Manufacturers Association that sponsored animal studies concerning acrylamide monomer exposure.

68. Prior to November 1998, the Acryalmide Monomer Producers Association had prepared by the staff of Toxicology Excellence for Risk Assessment (TERA) and Dr. Marvin Friedman a document entitled Integrated Biologically-Based, Multiple Endpoint Risk Assessment for Acrylamide. Phase 1: Cancer & Modes of Action. On November 16 and 17, 1998, the aforesaid acrylamide document was reviewed by a panel of scientists and risk assessors in a meeting held at the University of Cincinnati, College of Medicine, Cincinnati, Ohio. While acknowledging that unpolymerized acrylamide is contained in polyacrylamide, the objective of the overall project was to develop an integrated risk characterization for the four major toxicological endpoints of acrylamide of carcinogenicity, neurotoxicity, mutagenicity, and male reproductive toxicity with phase 1 addressing the carcinogenicity issue.

69. On March 1, 2000, Mallickrod and Baker, Inc., a producer of acrylamide, provided on its acrylamide Material Safety Data Sheet: "SUSPECT CANCER HAZARD MAY CAUSE CANCER. Risk of cancer depends on level and duration of exposure."

70. On June 25-27, 2002, a joint consultation was held by the Food and Agriculture Organization of the United Nations and the World Health Organization on the health implications of acrylamide in food in Geneva, Switzerland. Subsequently, a report was

released wherein it was recommended that "[dancer epidemiology in testicular toxicity in populations of known high exposure such as occupationally exposed workers with neurotoxic signs and high levels of haemoglobin adducts, should be studied."

D. Acrylamide Has Been Known to Cause Genetic Mutations and Chromosome Aberrations Since 1978

71. Acrylamide is also known to be distributed to male reproductive organs and to form adducts with sperm DNA and proteins. It has also been shown to be a germ cell mutagen and clastogen with a propensity to cause dormant lethal mutations in mice and rats.

72. In 1978, an increase was found in the frequency of chromosome aberrations in the primary spermatocytes of mice treated with acrylamide.

73. In 1982, acrylamide was reported to increase cell transformation frequency in mouse Balb 3T3 cells in the presence of a metabolic activation system and in BHK 21 cells.

74. On or before 1985, the Acrylamide Producer's Association initiated a two-generation reproduction study and dominant lethal assay with acrylamide monomer in Fischer 344 rats jointly sponsored by Dow Chemical USA, Nalco Chemical Company and Standard Oil Company.

75. In 1987, a group of genetic toxicologists determined that acrylamide was a dominant lethal mutagen in male rat germ cells in vivo, specifically in mature spermatozoa and late-stage spermatids.

76. In 1988, the National Institute of Public Health and Environmental Protection in The Nether-

lands studied acrylamide for its activity in a range of genotoxicity tests, including the Salmonella/microsome test, the fluctuation test using Klebsiella pneumoniae, the test for gene mutations at the TK and HRPT loci in L5178Y mouse lymphoma cells, tests for chromosomal aberrations and SCE's in V79 Chinese hamster cells, the sex-linked recessive lethal (SLRL) and somatic mutation and recombination (SMART) assays in *Drosophila melanogaster* and the mouse bone marrow micronucleus assay. They found acrylamide genotoxic activity in most systems.

77. On March 1, 2000, Mallickrod and Baker, Inc., a producer of acrylamide, provided on its acrylamide Material Safety Data Sheet: "POSSIBLE BIRTH DEFECT HAZARD. MAY CAUSE BIRTH DEFECTS BASED ON ANIMAL DATA."

78. In 2001, a study of the chromosomal composition of micronuclei in mouse NIH 3T3 cells determined that, after treatment with acrylamide, both the micronuclei containing whole chromosomes and micronuclei containing acentric fragments were found to increase in a dose-dependent manner, demonstrating that acrylamide is not only a clastogert but also an aneugen.

E. Reduction of the Residual Acrylamide Monomer to Low Levels Increases Production Costs

79. On August 30-31, 1972, a Symposium was held by the American Chemical Society, Division of Organic Coatings and Plastics Chemistry, in New York City. At this Symposium, various ways of reducing the concentration of monomer in acrylamide polymers was discussed. One method addressed was "to force the polymerization reaction to completion."

80. In 1977, prices for most polyacrylamides were in the $3.30 to $4.00 per kilogram range. An assessment by the United States Environmental Protection Agency found that "[p]roduction of polymer grades with very low monomer residuals involves up to 30 cents per kilogram additional price premium."

81. Because of the added costs associated with producing polyacrylamide with low residual monomer, the different possible end uses of polyacrylamide have had a great influence on the amount of residual monomer remaining in such products.

F. NICNAS Recommendations

82. The National Industrial Chemicals Notification and Assessment Scheme ("NICNAS") was established in Australia by the Industrial Chemicals (Notification and Assessment) Act of 1989 (Cwlth) which came into operation in July, 1990. The object of the NICNAS is to aid in the protection of people at work, the public and the environment from the harmful effects of industrial chemicals.

83. In response to concerns regarding possible human health and environmental hazards associated with the high-volume use of the acrylamide monomer and widespread use of polyacrylamide, the chemical acrylamide was declared a priority existing chemical for full assessment in August, 2000, by NICNAS.

84. In May 2002, NICNAS issued Priority Existing Chemical Assessment Report No. 23 on Acrylamide. In its report, NICNAS, recommended, *inter alia*, that: (1) Material Safety Data Sheets for polymer products contain information on the concentration of residual acrylamide monomer, (2) labels include the Hazard Category (toxic) or Signal Word (hazardous) for acrylamide products and polymers containing greater

than .1% acrylamide; (3) the use of acrylamide/polyacrylamide products be phased out where safer alternatives exist; (4) certain workplace control measures be implemented to reduce worker exposure; (5) routine air monitoring in the workplace; and (6) formal health surveillance guidelines be established which include, but are not limited to, neurological tests as well as tests for measuring haemoglobin adducts in blood and metabolites in urine.

G. Exposure to Acrylamide

85. The individually named Plaintiffs and the Classes they represent, are/were employed in and around coal preparation plants in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia or are the offspring of persons who are/were employed in and around coal preparation plants in West Virginia, Illinois, Indiana, Ohio Pennsylvania, Tennessee, and Virginia.

86. In the coal preparation plants, polyacrylamide flocculant is added to water used in processing the coal. This water is recirculated and additional polyacrylamide flocculant is added allowing the residual acrylamide monomer to increase. Polyacrylamide flocculant is primarily used in the coal washing process in the coal producing states in the Eastern United States.

87. While carrying out their job duties, each coal preparation plant worker was repeatedly and significantly exposed, on a daily basis, to polyacrylamide with the residual acrylamide monomer manufactured by Defendant Chemical Companies that was harmful and presented a significant degree of risk and strong probability of cancer, neurotoxicity, and genetic mutation from repeated exposures. These workers opened

bags of the polyacrylamide in powder form, dumped into a hopper, mixed it into the recycled water and cleaned machinery and pipes that contained the polyacrylamide. Further, these workers were exposed in essentially the same manner to the liquid form of polyacrylamide with the exception of opening bags of the chemicals.

88. Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, designed, manufactured, marketed, distributed and/or sold the polyacrylamide with the acrylamide monomer to which the Plaintiff Coal Preparation Plant Workers were exposed.

89. Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, have known or should have known for years that polyacrylamide with the residual acrylamide monomer, used in coal preparation plants, was dangerous and/or defective and that their products would cause injury and damage to persons who were exposed, including Plaintiffs and the Classes they seek to represent.

90. Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, have known or should have known of the dangers of their polyacrylamide with acrylamide monomer and owed a duty to provide information to the Plaintiffs and the Classes of people they seek to represent as to these dangers; including the proper and appropriate warnings which would clearly advise Plaintiffs and others in the Classes of the dangers of the use of polyacrylamide with acrylamide monomer.

91. Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, failed or refused to properly supervise, instruct and inform, by way of warnings, instructions, training and publication, the Plaintiffs and the Classes they seek to represent of the dangers associated with the use of their polyacrylamide with acrylamide monomer.

92. Defendant Chemical Companies encouraged the widespread use of polyacrylamide with acrylamide monomer for profit which they knew or should have known would reasonably harm Plaintiffs and others similarly situated by exposure to said chemicals.

93. Defendant Chemical Company Representatives were regularly present at the coal preparation plants and were aware of, and observed the usage of, the dermal and inhalation exposure of coal preparation plant workers, including the Plaintiffs and the Classes they represent, to the Defendant Chemical Companies' polyacrylamide flocculant.

94. Each of the Plaintiff Coal Preparation Plant Workers and the Classes they represent is fearful of developing deficits in the sensory and autonomic nervous systems, contracting cancer and/or experiencing permanent variations in his genetic makeup from exposure in the coal preparation plant to the polyacrylamide with the acrylamide monomer.

95. At all times complained of herein, Defendants were acting for and on their own behalf and as agents, ostensible agents, servants and/or employees in the course and scope of their employment, agency and/or ostensible agency.

COUNT I
STRICT LIABILITY IN TORT

96. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

97. That during the relevant time periods of employment for Plaintiff Coal Preparation Plant Workers, and the Classes they seek to represent, Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, designed, manufactured, packaged, inspected or failed to inspect, marketed and/or sold polyacrylamide flocculant for use in coal preparation plants in a defective condition unreasonably dangerous to the user of the chemical product.

98. That the Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives, are engaged in the business of selling polyacrylamide flocculants for use in coal preparation plants.

99. That the polyacrylamide flocculant is expected to and does reach Plaintiff Coal Preparation Plant workers and the classes they seek to represent, without substantial change in the condition in which it is sold by Defendant Chemical Companies and their agents, servants and employees, including but not limited to Defendant Chemical Company Representatives.

100. That as a direct and proximate result of the defective condition of the subject chemical provided by the Defendant Chemical Companies and their agents, servants and employees, including but not

limited to Defendant Chemical Company Representatives, for use in their coal preparation plants, the Plaintiffs and the Classes they seek to represent fear that serious health problems will develop, including cancer, sensory or autonomic nervous system deficits, and/or permanent genetic mutations, due to exposure to the said chemical.

COUNT II
MEDICAL MONITORING

101. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

102. Plaintiffs and the Classes they seek to represent have been exposed to increasingly cumulative and significant levels of acrylamide monomer that were repeatedly added in the coal preparation process.

103. Beginning in 1958, there is a substantial scientific evidence linking exposure of acrylamide to neurologic injury and disease.

104. Beginning in 1978, there is a substantial scientific evidence linking exposure of acrylamide to genetic mutations.

105. Beginning in 1984, there is a substantial scientific evidence linking exposure of acrylamide to certain types of cancer.

106. In May 2002, NICNAS recommended, *inter alia*, that: (1) Material Safety Data Sheets for polymer products contain information on the concentration of residual acrylamide monomer, (2) labels include the Hazard Category (toxic) or Signal Word (hazardous) for acrylamide products and polymers containing greater than .1% acrylamide; (3) the use of

acrylamide/polyacrylamide products be phased out where safer alternatives exist; (4) certain workplace control measures be implemented to reduce worker exposure; (5) routine air monitoring in the workplace; and (6) formal health surveillance guidelines be established which include, but are not limited to, neurolcgicallests as well as tests for measuring hemoglobin adducts in blood and metabolites in urine.

107. Defendant Chemical Companies have known for years that polyacrylamide with the residual acrylamide monomer, used in coal preparation plants, was unreasonably dangerous and defective and that their products would cause injury and damage to persons who were exposed, including Plaintiffs and the Classes they seek to represent.

108. In order to increase profitability, the Defendant Chemical Companies intentionally failed and/or refused to force to completion the reaction of the acrylamide monomer to polyacrylamide.

109. As a direct result of being exposed to the residual acrylamide monomer, Plaintiffs and the Classes they represent, have been placed at a significantly increased risk of disease relative to their risk had they not been exposed to the residual acrylamide monomer.

110. Testing and treatment is reasonably necessary to help with early detection and/or diagnoses of diseases from such exposures. Qualified physicians would prescribe such testing and treatment based upon the Plaintiffs' and Class members' exposure to acrylamide.

111. Monitoring tests are widely available which could help the Plaintiffs and the Classes they represent to detect and prevent the types of diseases and

illnesses which can result from exposure to acrylamide.

112. Plaintiffs, therefore, pray for relief on behalf of themselves and the Classes they represent in the form of an independently supervised medical monitoring program, funded by the Defendants.

COUNT III
PUNITIVE DAMAGES

113. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

114. The actions of each of the Defendants, and all of them, knowing of the defect, as set forth herein above, were done intentionally, with complete indifference, and amounted to an independent willful tort. The conduct of said defendants was further done maliciously, fraudulently, willfully, wantonly, knowingly and/or with a conscious and/or reckless disregard for the rights and safety of the Plaintiffs and others, including the Classes they seek to represent, and/or amounted to aggravated or egregious fraud or insult, entitling the Plaintiffs and the Classes they seek to represent to punitive damages.

PRAYER

WHEREFORE, Plaintiffs on behalf of themselves and all other persons similarly situated, pray for judgment, jointly and severally, against the Defendants as follows:

a. Certification of the Class under Rule 23 of the West Virginia Rules of Civil Procedure, and appointment of Plaintiffs as Class Representatives and the undersigned counsel as Class Counsel;

b. Establishment of Court-supervised programs for monitoring of deficits for the sensory and/or autonomic nervous systems;

c. Establishment of Court-supervised programs for monitoring of adverse medical conditions associated with exposure to polyacrylamide with acrylamide monomer for cancer, including, but not limited to cancer of the scrotum/testicles, adrenal gland, mammary gland, uterus, thyroid, pancreas, brain, spinal cord lungs and/or Hodgkin's Disease;

d. Establishment of Court-supervised programs for monitoring of adverse medical conditions from exposure to polyacrylamide with acrylamide monomer for genetic mutations and chromosome aberrations;

e. For compensatory, punitive and other damages as alleged herein;

f. An Order reserving the individual damage claims of Plaintiffs and each member of the Classes for separate resolution in this action or in any other individual, consolidated or class action;

g. For pre-judgment interest;

h. For all costs of this proceeding, including reasonable attorney fees; and

i. For all general, special, and equitable relief to which the Plaintiffs and the members of the Classes are entitled by law.

PLAINTIFFS DEMAND A TRIAL BY JURY.

WILLIAM K. STERN,
LEONARD A. SNYDER,
MICHAEL CAPUTO,
TERRY TUCKER,
MICHAEL E. ROMADA
RODNEY FERRELL,
WILLIAM THOMAS ADKINS, II,
JONATHAN PAUL SPENCER,
And JOHN DOE
By Counsel

[signature blocks omitted]

APPENDIX D

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Civil Action No. 03-C-49M

CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Petitioners / Defendants,

v.

THE HONORABLE JOHN T. MADDEN, And All Plaintiffs In *STERN, et al. v. CHEMTALL INCORPORATED, et al.*,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

I. SUMMARY OF THE ARGUMENT

In this action, Plaintiffs seek medical monitoring for diseases they claim may develop in the future

because of their exposure to polyaerylamide flocculants, products used to treat coal wash water at coal preparation plants. Plaintiffs claim the need for medical monitoring arises from residual trace amounts of acrylamide monomer, from which the flocculant is made. Plaintiffs seek a Rule 23(b)(2) class action, and claim to represent coal preparation plant workers in West Virginia and Pennsylvania.

On January 9, 2007, the Circuit Court of Marshall County entered two orders in *Stern, et al. v. Chemtall, Inc., et al.*, Civil Action No. 03-C-49M (herein "*Stern*") — the Intervention Order (attached hereto as Exhibit A) and Trial Plan Order (attached hereto as Exhibit B). These Orders flout prior instructions and mandates of this Court, exceed due process limitations on the imposition of punitive damages, and create an untenable medical monitoring trial plan, unprecedented in West Virginia jurisprudence. Three distinct errors infect these Orders and require issuance of a Writ.

* * * *

Second, the Circuit Court trampled upon several constitutional and judicial prohibitions when it declared, again upon Plaintiffs' suggestion and request, that the appropriateness of punitive damages, and a punitive damage multiplier, would both be determined in a liability-free first phase of this medical monitoring action. This aspect of the trial plan is reversible error on several levels. Punitive damages are simply unavailable in an action in which only equitable relief is sought, or where no individual harm is alleged and no compensatory damages are sought. Moreover, even where punitive damages can be considered, the trial court is required to ensure that the punitive damages are tied to the injuries of

specific, individual Plaintiffs. *See Philip Morris v. Williams*, U.S. 2007 WL 505781 (Feb. 20, 2007) Finally, the appropriateness of punitive damages cannot be determined prior to a finding of underlying liability, yet the Circuit Court's adoption of the Plaintiffs' bifurcated trial plan ensures exactly that.

Third, the Circuit Court, in its Trial Plan Order, *sua sponte* reviewed the laws of West Virginia and Pennsylvania, the two states remaining in the putative class action, and concluded that the jury could adjudicate medical monitoring claims arising under Pennsylvania and West Virginia law both in the same trial before the Court has certified the case as a class action. In doing so, the Circuit Court ignored this Court's December 2, 2004 Writ instructing it to undertake a full analysis, with a hearing if necessary, of whether the claims of the representatives from the different states are based on "the same legal theory," and whether there exist any "material conflicts, constitutional full faith and credit and due process principles" that prevent the non-West Virginia representative's claims from being tried with those of the West Virginia claims. *See* Trial Plan Order. The Circuit Court's conclusory treatment, without benefit of briefing from either party, erred because the states' laws concerning medical monitoring claims and other important issues are substantially and materially different, thus precluding a joint trial under this Court's December 2, 2004 instructions.

For these and many other reasons, the Circuit Court's January 9, 2007 Intervention Order and Trial Plan Order are violative of West Virginia law and federal constitutional law. Therefore, a Writ of Prohibition and/or Mandamus is urgently needed to correct these errors.

* * * *

IV. ARGUMENT

* * * *

B. THE CIRCUIT COURT'S RULING REGARDING THE AVAILABILITY AND PROCEDURE GOVERNING PUNITIVE DAMAGES IS UNCONSTITUTIONAL.

The Circuit Court's Trial Plan Order allows the jury to determine whether punitive damages against each Defendant are warranted and, if so, a multiplier for such damages *before* a finding of liability as to any Defendant toward any Plaintiff; *before* any Plaintiff must demonstrate entitlement to medical monitoring, the only claim presented here; and before any verdict becomes binding through a determination of class certification. *See* Trial Plan Order at 25-29 (listing questions for Phase One of trial, none of which concern proof of Plaintiffs harm or causation). In this case, Plaintiffs seek *only* equitable relief, have not brought personal injury claims, and are *not* entitled to *any* compensatory damages.

The Trial Plan Order, while seemingly similar to trial plans utilized in some West Virginia Trial Court Rule 26 cases, such as the asbestos docket, is thus actually a significant departure from the well-settled law of this State and the precedents of the United States Supreme Court, including *Philip Morris v. Williams*, __U.S.__ 2007 WL 505781 (Feb. 20, 2007), just issued by the Court. Because the very structure of the punitive damages determination set up by the Circuit Court is suspect, appellate review through remittitur after any such award is made will be inadequate to cure the constitutional defect. The error requires correction now, prior to trial, to ensure that

the parties and Circuit Court avoid the expense and prejudice of a constitutionally-infirm trial.

1. The Circuit Court's Procedure for Awarding Punitive Damages Violates Defendants' Due Process Rights.

The Fourteenth Amendment bars West Virginia from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST., AMEND. XIV. Punitive damages are a deprivation of property requiring safeguards to ensure any such award is not arbitrary and fully comports with due process. *Williams*, 2007 WL 505781 at *2. This requirement applies both to the procedures applicable to the jury's decision to award punitive damages and the calculation of the amount. *Id.* at *4 (both "the procedures for awarding punitive damages" and "the amounts forbidden as grossly excessive" present Due Process Clause concerns).

The procedure set forth in the Circuit Court's Order fails to ensure that any punitive damages award is reasonably related to any actual harm suffered by any Plaintiff in this uncertified class action seeking an equitable court-supervised medical monitoring program. As set forth below, the procedure ordered by the Circuit Court violates Defendants' Due Process Clause rights because:

> Punitive damages must be tied to a particular Plaintiff and the particular injury he suffers; punitive damages cannot be determined where, as here, the phase one issues pertain to no particular named Plaintiff and no class has been certified; and
>
> Punitive damages entitlement cannot be determined prior to finding any Defendant liable on

the medical monitoring claim presented by Plaintiffs, as contemplated by the Circuit Court's Order.

The Circuit Court's Order is thus unconstitutional in its design and must be remedied by this Court in order to prevent a deprivation of Defendants' rights.

a. The Due Process Clause Requires that a Jury Determine Punitive Damages Based on a Plaintiff's Individualized Harm.

The phase one punitive damages trial plan ordered by the Circuit Court violates due process because all issues to be tried in that phase, at the same time the jury determines entitlement to punitive damages, are general issues not tied to any claim of any specific Plaintiff. *See* Trial Plan Order at 27-28. This plan will prevent Defendants from raising available affirmative defenses. There will simply be no way for any Defendant to respond to allegations of general harm by even attempting to demonstrate that these particular Plaintiffs have valid claims, for example by showing their particularized exposures, if any, caused no increased risk of contracting a particular disease, as required by *Bower*.

This procedure is in clear violation of the Supreme Court's just-issued decision in the *Phillip Morris v. Williams* case, __U.S.__ 2007 WL 505781. In *Williams*, the Supreme Court vacated and remanded an Oregon Supreme Court opinion upholding a jury verdict finding Williams' death was caused by smoking Philip Morris products, and awarding $821,000 in compensatory damages and $79.5 million in punitive damages. The *Williams* Court found that the trial court violated defendant's Due Process Clause rights when it failed to ensure that the jury did not base its

punitive damages award "in part upon its desire to *punish* the defendant for harming persons who are not before the court." *Id.* at *3 (emphasis in original).

The Court ruled that a punitive damages award must rely upon the defendant's conduct *toward plaintiff*. *Id.* at *5. Otherwise, a defendant has no adequate notice of the magnitude of the penalty that might be assessed against it; no ability to raise its defenses against the claim of persons not before the court; and no opportunity to contest liability as to such individuals. *Id; see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *B.M.W. of North America, Inc.*, 517 U.S. at 575-76 (1996) (discussing factors to be applied); *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) (recognizing an assessment of punitive damages requires a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award). The Court stated:

> [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. . .
>
> [W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award

> in light of the potential harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the *plaintiff*.

Williams, 2007 WL 505781 at *5 (emphasis in original) (*citing State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The Court therefore "explicitly" held that "a jury may not punish for the harm caused others," regardless of whether the other harm is similar to that alleged to have harmed plaintiff. *Id.* at 7.

The Supreme Court therefore concluded that procedural safeguards must be employed to ensure that juries do not impose awards that run afoul of the Due Process Clause:

> [G]iven the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries . . .—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

Id. at *6.

Such procedural safeguards are not just absent here, they are precluded by the trial plan. The Circuit Court's decision to allow a punitive damages determination in phase one under the collective issues to be presented in that phase, without any liability finding as to any particular Plaintiff, prevents Defendants from exercising the basic due process rights to "present every available defense" and to confront and

cross-examine adverse witnesses. *See id at *5, quoting. Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Plaintiffs will be allowed instead to seek punitive damages by "portraying [coal preparation and water treatment workers] as a large, unified group that suffered a uniform, collective injury," while Defendants are forced to "defend against a fictional composite without benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). This procedure will create the "near standardless dimension to the punitive damages equation" forbidden by *Williams*. 2007 WL 505781 at *5.

This error is compounded untold times by the Circuit Court's decision to delay class certification proceedings until *after* trial on the merits. Thus, the universe of plaintiffs will not even be defined prior to the jury's determination of punitive damages entitlement and multiplier. *See* Trial Plan Order at 24-26. Under the Court's trial plan, it will be unknown at the time of trial whether any class will be certified, how such class(es) may be defined, etc.—and therefore whether any individual will be bound by the jury's phase one punitive damages decision or multiplier.[5] As the United States Supreme Court has noted, only parties to the action are bound by a judgment. *State Farm*, 538 U.S. at 423. Thus, not only does the Court's trial plan fail to tie any punitive damages determination to the alleged harm to any particular Plaintiff, it also fails to determine whether

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[5] *See also*, Defendants' argument in Section D, *infra*, regarding material conflicts between Pennsylvania and West Virginia law regarding, *inter alia*, class certification issues.

the collective award that may be visited upon Defendants binds anyone other than named Plaintiffs.

At the time of trial, Defendants will have no assurance one way or the other as to whether additional individuals will be bound by the judgment; who those individuals might be through class descriptions; how the time frames might be defined for those Plaintiffs, etc.[6] Even if delayed class certification were an appropriate trial management decision in a usual case seeking only compensatory damages (and Defendants note that mass trials are often not brought as class actions at all), it is not appropriate to delay class certification proceedings when plaintiffs seek to obtain a punitive damages judgment on a class-wide basis. *See Williams*, 2007 WL 505781 at *5 (a State may not use a punitive damages aware "to punish a defendant for injury that it inflicts upon nonparties

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[6] Besides the application of a two-year statute of limitations for bringing medical monitoring claims, *see State ex rel. Chemtall v. Madden*, 216 W.Va. 443, 456 (2004), more importantly, for purposes of this Petition, the applicable time frame is directly relevant to the issue of what conduct of any given defendant a jury is permitted to consider in connection with a punitive damages award. Polyacrylamide flocculant has been in use in water treatment applications since the late 1960s, and it continues to be used today. The product manufacturing techniques, scientific knowledge, industry practices, Material Safety Data Sheets, application equipment, and many other things have changed over time. Individual defendants have entered or exited the market at different times. Behavior a jury might find culpable that occurred in 1969, or in 1999, will not apply to all defendants, or to all named plaintiffs, or to all potential but as-yetundefined class members. It will therefore be impossible with the trial plan implemented by the court to assure defendants' due process right to have evidence applicable to individual plaintiffs considered with respect to any punitive damage finding or multiplier.

or those whom they directly represent . . . .") Named Plaintiffs will represent no one other than themselves at the time of trial under the plan implemented by the Circuit Court, yet they will still benefit from the gloss of being "representatives" of the putative class(es). The plan creates a lose-lose for Defendants: should any Defendant be found liable for punitive damages, that decision will be inflated by the jury's consideration of harm to others not represented by Plaintiffs in violation of *Williams*; conversely, a "win" on the punitive damages issue by any Defendant in phase one binds no one but the named Plaintiffs, and presumably the incentive for Plaintiffs to even attempt to certify the class disappears entirely, leaving Defendants vulnerable to brand new punitive damage claims from a new set of putative class representatives, based upon the same conduct.

Because the Circuit Court's Order violates Defendants' due process rights by allowing the jury to consider punitive damages without regard to any findings specific to any particular Plaintiff's exposure claim, and further errs by conducting this flawed phase one trial prior to considering class certification, a Writ should issue.

b. The Circuit Court's Order Is Unconstitutional Because it Requires a Determination of Punitive Damages Prior to any Finding of Actual Liability Against Any Defendant.

In *Williams*, the Court stated unequivocally that punitive damages are meant to punish "unlawful conduct." *Id.* at *4 (*quoting B.M.W of North America, Inc. v. Gore*, 517 U.S. 559, 575-76 (1996)). Whatever the other flaws in the trial court's procedures as outlined by the Supreme Court in that case, the Williams jury did consider the liability of defendant

Philip Morris and found defendant liable to Plaintiff Williams for compensatory damages prior to awarding punitive damages.

In this case, the jury will not even be given the task of finding any Defendant actually liable to any Plaintiff prior to determining Plaintiffs' entitlement to punitive damages in this case. In its Order, the Circuit Court bifurcated "liability and punitive damages" from "medical monitoring and class certification." Trial Plan Order at 26-27 (emphasis supplied). The Circuit Court did not demonstrate an understanding that Defendants will not be liable in this medical monitoring-only case unless all factors of *Bower* are met; the court stated, "[s]hould Plaintiffs prevail on the issue of liability [in phase one], the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages." *Id.* at 28-29. Phase One therefore *excludes* key components of liability, such as actual causation and all factors of *Bower* necessary to determine the appropriateness of medical monitoring—the only liability claim presented by Plaintiffs—and it places the determination of punitive damages *ahead* of any liability finding. *See* Trial Plan Order at 26-28.

The Circuit Court's decision to allow a jury to determine whether punitive damages are appropriate, and to then select a multiplier, *prior* to determining medical monitoring liability is constitutionally flawed. Due process allows awards of punitive damages only for "unlawful conduct." *See Williams*, 2007 WL 505781 at *4. Punitive damages must "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred," and can be

awarded only if a defendant is liable to a plaintiff. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656 (1991), Syl. Pts.1, 3; *see also Alkire v. First National Bank of Parsons*, 197 W. Va. 122 (1996) (requiring jury to consider actual harm when determining punitive damages entitlement.) Indeed, punitive damages "must be determined after proof of liability to individual plaintiffs." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998); *Engle v. Liggett Group, Inc.*, 2006 WL 1843363 at *8-9 (Fla., as amended Dec. 21, 2006) (finding that it was error not to conduct a full liability determination, including actual damages and causation, prior to determination of punitive damages.) A multiplier awarded in a vacuum, with neither a full liability determination as to all *Bower* factors nor even any evidence as to the scope of medical monitoring that may be sought, violates this principle.

The Second Circuit's decision in *In Re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005), provides a cogent analysis of these issues in a similar context, involving an attempt to certify a multistate punitive damages class against tobacco manufacturers. The Second Circuit found that the trial court's plan to assess punitive damages prior to liability awards of compensatory damages for each individual plaintiff did not satisfy the Due Process Clause. Thus, the court found that determining entitlement to punitive damages prior to any actual liability finding against any individual defendant in favor of any individual plaintiff was unconstitutional, and it refused to certify a class under such a plan.

The Second Circuit came to this conclusion even though (1) the trial would have occurred after class certification; and (2) the jury would have been asked

to determine an "estimated total value" of compensatory damages before even determining whether punitive damages were available. Even these minimal protections are absent from the Circuit Court's Order here.

Determining a multiplier before a decision on all liability factors is especially troubling in this case, because Plaintiffs seek *only* a medical monitoring fund, and are neither entitled to nor seeking compensatory damages. A determination of the amount of any medical monitoring fund will involve, presumably, a calculation of the cost and recommended frequency of available testing, the number of eligible claimants, the number of years monitoring that may be appropriate, and similar factors which are not at all similar to the calculation of personal injury damages meant to compensate a plaintiff for actual injury more typically performed by juries. The concept of a "multiplier" is supposed to provide a measure of proportionality between the amount that compensates a plaintiff for a defendant's unlawful conduct and the amount of punishment. Here, the amount that may ultimately be paid into a medical monitoring fund is not by any measure a compensatory award; hence, a punitive damages "multiplier" tied to the medical monitoring fund amount would never yield a proportional punishment as required by the Due Process Clause. *See State Farm*, 538, U.S. at 416-18; *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 649 (2004).[7] Should punitive damages be found appropri-

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[7] The Court need not, therefore, revisit in this case whether initially determining a punitive damages multiplier for a compensatory damages award—a procedure used in other West Virginia cases—is constitutional under *Williams* or any other precedents, and defendants take no position on this issue be-

ate and a multiplier chosen under the Circuit Court's scheme, Defendants will be left to ask: a multiplier of what? *See Williams*, 2007 WL 505781 at *5 (noting that punitive damages finding based upon harm to nonparties rather than on liability of defendant for harm incurred by plaintiff adds a "near standardless dimension" to the punitive damages decision in violation of the Due Process Clause).

2. Plaintiffs Are Not Entitled To Seek Punitive Damages In This Equitable Medical Monitoring Class Action Case.

Williams makes clear that the procedures relied upon by the Circuit Court here for the imposition of punitive damages are unconstitutional, and Defendants believe, at a minimum, this Court should issue a Writ on that basis. Defendants also assert that, regardless of the procedure utilized by the Circuit Court, no award of punitive damages would ever be constitutional in this case because

> Punitive damages are not available in an equitable medical monitoring case where Plaintiffs allege no actual individual injury and do not seek compensatory damages;
>
> Punitive damages cannot be awarded on a class-wide basis, at least in a multiple Defendant, multiple product toxic tort action presenting individual issues of exposure, warnings, and other actions of individual Defendants that do not apply to all class members.

Defendants therefore ask the Court to issue a Writ finding that the Circuit Court has exceeded its

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cause it is not presented by this medical monitoring-only matter.

authority by permitting Plaintiffs to proceed with a punitive damages claim in this matter, and directing that the punitive damages claim presented by Plaintiffs be dismissed outright.

a. Punitive Damages are Unconstitutional Because Plaintiffs' Allege No Actual Harm and No Compensatory Damages.

A plaintiff may not recover punitive damages in the absence of actual harm and recovery of compensatory damages. *See Garnes*, 186 W. Va. at 667 & Syl. Pt. 1. *See also Given v. Fuel Gas. Co.*, 99 S.E. 476 (W.Va. 1919); *Livingston v. Woodworth*, 56 U.S. 546, 559 (1853) ("A court of equity may not be converted to an instrument for the punishment of simple torts."); 11 A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2942 at 53-54 (2d ed. 1995). Plaintiffs here neither seek to prove actual harm, nor to recover any compensatory damages for such harm; they seek only an equitable, court-supervised medical monitoring program. *See* Pls.' Class Action Comp. ¶ 31; Compl. of Intervenors, Prayer for Relief (attached hereto as Exhibit F); Trial Plan Order ("As previously ordered, Plaintiffs have advised the Court that they will proceed under Rule 23(b)(2) of the West Virginia Rules of Civil Procedure and that their claim under Rule 23(b)(3) is withdrawn. It is so ordered.") Plaintiffs have asserted no personal injury claims, and have not suffered any actual, present physical injuries from their alleged exposure to Defendants' products. In these circumstances, punitive damages are not available.

The West Virginia Supreme Court of Appeals has defined the "injury" claimed by a medical monitoring plaintiff as a "significantly increased risk of contracting a particular disease." *See Chemtall v. Madden*,

216 W. Va. 433, 455 (2004) (emphasis supplied). A medical monitoring claim under *Bower* imposes liability not for actual harm, but for increased risk of future harm. Under *Bower,* a "plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure." 206 W.Va. at 142, 522 S.E.2d at 433. "All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and '[n]o particular level of quantification is necessary to satisfy this requirement.'" *Id.* (citations omitted.) No actual disease or physical harm is required, and indeed Plaintiffs have specifically requested monitoring only for disease that may develop in the future.

The Due Process Clause, as explained in *Williams, State Farm v. Campbell* and elsewhere as discussed above, requires a jury to measure the entitlement to punitive damages by the amount of harm suffered by plaintiff, and prohibits "grossly excessive or arbitrary punishments." *State Farm*, 538 U.S. at 416. Both the United States Supreme Court and this Court have held that the proper measure of such deprivation begins with a determination of the proportionality between compensatory damages and punitive damages. *Id.* at 418; *Bowyer v. Hi-Lad. Inc.*, 216 W.Va. 634, 649 (2004); *Rohrbaugh v. Wal-Mart Stores*, 212 W.Va. 358, 363 (2002). By the design of Plaintiffs' own claim, the jury will be without any such standard here, rendering constitutionally suspect any determination awarding punitive damages. In the absence of any claim for actual damages, the Court itself also will lack a standard by which it can later review any assessment of punitive damages. Thus, any punitive

damages award can only be arbitrary and would deny the Defendants' due process rights.

A separate lawsuit, the *Pettry* case (involving some but not all of the *Stern* Defendants), alleges personal injury and has been transferred to the Circuit Court of Marshall County; any *Stern* Plaintiff presumably will bring a claim for personal injury (either in the *Pettry* litigation or separately) should an injury develop. Intervenors from the *Pettry* matter have expressly removed any personal injury claim from this case, and have sought monitoring only for future disease. *See* Compl. of Intervenors, Prayer for Relief. Thus, if indeed Defendants' products are harmful as Plaintiffs allege, the *Stern* medical monitoring case will not be the last or only litigation on that issue. Any question of punitive damages entitlement will more appropriately be litigated in the context of seeking compensatory damages for an actual injury, rather than in a case where the harm is only theoretical or possible.

Plaintiffs wish to proceed with a claim for medical monitoring in the absence of physical injury, and also seek to obtain punitive damages. The question is: how far from traditional, injury-based torts will the Court allow Plaintiffs to roam? An inchoate or incomplete tort—bad conduct without injury—is generally not a legitimate basis for recovery in tort. Only under very narrow circumstances, such as defined in the Court's *Bower* decision, are such incomplete torts allowed. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 143-44, 522 S.E.2d 424, 434-35 (1999) (Maynard, J., dissenting).

Defendants urge the Court to hold the boundary of permissible punitive damage awards to those cases wherein a plaintiff alleges actual present injury, and

a defendant is found liable for compensatory damages to that plaintiff. This lawsuit is not such a case, and the Circuit Court's Order permitting the punitive damages claim to proceed at trial must be reversed.

b. Punitive Damages Cannot Be Awarded On A Class-Wide Basis In This Multiple Defendant Products Liability Case.

The *Williams* case makes clear that entitlement to punitive damages, and the amount of the award, must directly relate to the harm to the individual Plaintiff before the Court, or "those whom they directly represent." *Williams*, 2007 WL 505781 at *5. *Williams* did not arise in the context of a class action, and the Supreme Court has not provided other guidance as to whether or how punitive damages can be applied in a class action context. However, the very specific holding in *Williams*—that actual harm to the plaintiff and "harm potentially caused *the plaintiff*" must be the touchstones for any punitive damages award—indicates that class treatment of punitive damages is not possible in this case. *Id.*

Indeed, in the class action context, the requirement of individualized punitive damages assessment has led numerous courts to refuse to certify punitive damages claims for class-wide treatment. *See In re Telectronics Pacing Systems, Inc.*, 172 F.R.D. 271, 294 (S.D. Ohio 1997) (class certification of punitive damages not proper because, like compensatory damages, punitive damages measured individually based on the facts and local law); *In Re Simon II Litigation*, 2005 WL 1052659 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 215 (D. Minn. 2003); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo. 1997);

Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 249 (Md. 2000); *Southwestern Ref Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

Defendants do not ask the Court to find that punitive damages can never be treated on a class-wide basis; instead, Defendants assert that such treatment cannot be given in this case because all issues in this matter that involve the appropriateness of punitive damages depend upon proof specific to individual plaintiffs and defendants. *See* W.VA. R. IV. PRO. 23(a) (requiring named Plaintiff's claims to be typical and common of all class members). Here, there are eight unrelated corporate Defendants, and all manufactured and/or sold dozens of different polyacrylamide flocculant products to, potentially, hundreds of different coal preparation facilities. Such sales occurred at different times, over decades, and were accompanied by individual Defendant warnings, sales practices, research, etc. In addition, Plaintiffs each worked at different facilities, experiencing different levels and years of potential exposure. Even if punitive damages could be treated on a class-wide basis in, for example, an insurance practices case, or a pharmaceuticals case against a particular manufacturer, punitive damages cannot be given class-wide treatment here consistent with *Williams* and Rule 23(a). Defendants therefore ask the Court to issue a Writ instructing the Circuit Court to dismiss Plaintiffs' punitive damages claim outright.

* * * *

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No. 07-1033

IN THE
SUPREME COURT OF THE UNITED STATES

CHEMTALL INCORPORATED, ET AL.,
Petitioners,

v.

WILLIAM K. STERN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICI CURIAE* AMERICAN CHEMISTRY COUNCIL, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent businesses that often find themselves targeted in civil actions seeking punitive damages. For this reason, *amici* have a substantial interest in ensuring that punitive damages trials are conducted in a manner that is fair and consistent with due process safeguards. As we will explain, the West Virginia trial court's plan here to decide punitive damages violates these core principles.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

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[1] No counsel for either party has authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The subject Petition presents the Court with an opportunity to consider whether a trial court may put the "cart before the horse" and determine a defendant's liability for punitive damages before basic issues of compensatory liability and damages have been decided.

The West Virginia trial court plan at issue would permit a jury to determine Petitioners' liability for punitive damages and set a punitive damages "multiplier" prior to class certification, before a full determination of the Petitioners' liability for medical monitoring, and before any medical monitoring damages have been determined. The trial plan conflicts with this Court's recent decisions relating to punitive damages procedural due process protections. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 583 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), emphasize that pun-

ishment must focus on the defendant's conduct toward the plaintiff, may be imposed only after a defendant has had a full opportunity to defend against the charge, and should only be imposed when the plaintiff's proven compensatory damages are insufficient to serve the state's objectives of deterrence and punishment. Determination of whether, and to what extent, punitive damages may be awarded cannot occur in a vacuum, unanchored to any actual class that has been shown to be eligible for medical monitoring, and before determination of the amount of any recovery.

Moreover, the "reverse bifurcation" approach to punitive damages trials places civil defendants (particularly out-of-state corporations) at substantial risk that they will be arbitrarily deprived of their property. The West Virginia approach appears intended to wield a heavy club to pressure defendants to settle mass tort claims. Defendants will find it virtually impossible to receive a fair trial once the jury considers issues relevant to punitive damages in the first phase of a bifurcated trial. The evidence presented will inevitable serve to taint any verdict that is subsequently rendered. Given the potential for a forced settlement, it is important for this Court to grant the subject Petition and review the trial court's plan at this stage.

The brief does not repeat the Petitioners' arguments. Rather, the brief begins by considering the policy and jurisprudence of this Court relating to procedural due process protections for civil defendants, and the incongruous effect of any trial plan that proposes to determine punitive damages before the essential elements of a case. The brief then ex-

amines the concerns expressed by courts in dealing with "reverse bifurcation" procedures. The brief concludes that if the trial court's plan is left to stand, the use of the litigation tactic will be implemented with increasing frequency to the severe prejudice and detriment of civil defendants. Indeed, the issue is the subject of another petition for certiorari that is pending before this Court. *See Philip Morris USA Inc. v. Accord*, No. 07-806 (petition filed Dec. 17, 2007). Accordingly, *amici* urge this Court to grant certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIO-RARI AND CLARIFY THAT "REVERSE BIFURCATION" IN PUNITIVE DAMAGES TRIALS VIOLATES DUE PROCESS

Plaintiffs-Respondents seek medical monitoring for conditions they claim may develop because of their exposure to products used to treat coal wash water at coal preparation plants. They also seek punitive damages. The trial court adopted a "reverse bifurcation" plan in which punitive damages would be determined before a full determination of compensatory liability and damages.

In the first phase, the jury would consider whether a defendant's conduct warrants punitive damages as well as specific liability issues suggested by Plaintiffs. If the jury determines that the defendant's conduct justifies imposition of punitive damages, then the jury may set a "multiplier" that the court would later apply to any medical monitoring recovery. Not until the second phase of the trial would the court and jury consider the merits of the

case, including class certification and liability for medical monitoring.

Determining punitive damages before liability raises serious constitutional issues. As explained below, this Court should take this opportunity to hold that the trial plan contravenes due process safeguards in the United States Constitution that protect civil defendants from the arbitrary imposition of punishment.

A. Applicability of this Court's Procedural Due Process Safeguards to Reverse Bifurcation in Punitive Damages Trials

This Court has repeatedly emphasized the importance of procedural protections for defendants as essential to sustaining a punitive damage award. *See Williams*, 127 S. Ct. at 1065 (finding that jury instruction did not properly cabin jury discretion and led to arbitrary punishment); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2002) (holding that review of punitive damage award must be *de novo*); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21 (1994) (finding unconstitutional the limited authority of Oregon appellate courts to review punitive damages awards). The Court has recognized that unlimited judicial or jury discretion "may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990). This case presents an opportunity for this Court to clarify that a reverse punitive damage bifurcation procedure, such as that used by the West Virginia trial court, runs afoul of this jurisprudence.

As this Court has emphasized in determining whether a court's method of calculating punitive damages violates due process, a benchmark is whether the court's plan departs from traditional procedures. *See Oberg*, 512 U.S. at 421. "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* at 430. The adequacy of procedural protections is particularly important with respect to punitive damages because such awards "pose an acute danger of arbitrary deprivation of property" and come with "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 432.

In this case, the trial court's reverse bifurcation approach to decide punitive damages – which the West Virginia courts view as "creative, innovative" trial management, *see In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) – is assuredly not a time-tested common law procedure. Instead, the trial court's plan places a defendant at great risk of an arbitrary result. If permitted to stand, such a procedure could become commonplace. This Court should grant certiorari to address this atypical and unfair practice.

B. The Trial Court's Reverse Bifurcation Plan Runs Afoul of this Court's Mandate that Punitive Damages Awards Must Reflect the Harm to the Individual Before the Court and the Conduct at Issue

A theme of this Court's recent jurisprudence is that punitive damages may only be imposed to pun-

ish a defendant for conduct directed toward those before the court, and the harm to those parties. *See Williams,* 127 S. Ct. at 1063; *Campbell,* 538 U.S. at 422-23. This Court could not be more clear on this point than in its recent decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In that case, a lawsuit for negligence and deceit brought by the widow of a smoker, an Oregon court refused to instruct the jury that it could not punish the defendant for injuries to persons not before the court. The result, a $79.5 million punitive damage award, was reduced by the trial court to $32 million, but fully reinstated by the intermediate appellate court. *See* 127 S. Ct. at 1061-62. In vacating the award, this Court did not consider the excessiveness of the punitive damage award, but focused its inquiry on whether the procedures used were sufficient to avoid an arbitrary result. *See id.* at 1062-63. The basis of the Court's finding that punitive damages cannot be awarded based on harm to "strangers in the litigation," is salient in this case:

> For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing an individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing . . . that the other victim was not entitled to damages. . . .
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the pu-

> nitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.
>
> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.

Id. at 1063 (internal quotations and citations omitted).

Where, as here, a jury is to consider punitive damages before certification of the class, and before a full determination of liability and damages, the defendant would not have "an opportunity to present every available defense" before such a decision is made. Moreover, consideration of punitive damages before class certification would appear to leave the same crucial questions unanswered as in *Williams*: how many victims are there, how serious are their injuries, and how did their injuries occur? *Williams*

does not permit a jury to decide whether a defendant's conduct warrants punitive damages, and the appropriate amount or multiplier for such damages, in the absence of answers to these questions.

This Court's earlier decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), further illustrates the need for a punitive damage determination to focus on the defendant's conduct directed toward the individual or individuals before the court. In *Campbell*, the Court ruled that the Utah Supreme Court erred in finding that State Farm's nationwide policies, rather than the conduct directed toward the plaintiffs, could support a punitive damage award. *See id.* at 420. While the Court's decision was rooted in a violation of principles of federalism that would effectively allow a local court in one state to set regulatory policy in a sister state, "a more fundamental reason" for its invalidation of the award was the lack of a nexus between the punishment and the Campbells' harm. *Id.* at 422. The Court held:

> A defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit the courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant in the guise of the reprehensibility analysis, but we have no doubt the Utah

> Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 422-23; *see also Haslip,* 499 U.S. at 18-20 (instructing that punitive damage awards must take into consideration "the character and degree of the wrong shown by the evidence" and be based on "a meaningful *individualized* assessment of appropriate deterrence and retribution") (emphasis added).

The trial plan at issue, however, would have a jury reach a punitive damage "multiplier" before knowing who is before the court, the extent of harm they experienced, and whether the defendants are responsible for their claims. It is similar to the "hypothetical claim" that this Court found impermissible in *Campbell.* In granting certiorari, this Court would have an opportunity to clarify that a punitive damage award cannot satisfy due process where the award is decided before knowing the identity of the plaintiffs, what conduct the defendant directed at those plaintiffs, the level of reprehensibility of the conduct toward those plaintiffs, and the degree of harm they sustained.

C. The Trial Court's Plan to Set a Punitive Damages "Multiplier" in a Vacuum is Arbitrary and Should be Declared Unconstitutional

Determination of whether, and to what extent, punitive damages may be awarded cannot occur in a

vacuum, unanchored to any claim that has been shown to be eligible for damages, and before determination of the amount of any recovery. As this Court has repeatedly found, punitive damages can only be awarded to punish a defendant for harm to those before the court, and the punishment must be proportional to the offense. *See Williams*, 127 S. Ct. at 1063; *Campbell*, 538 U.S. at 422.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court outlined its now well known three-prong test for reviewing punitive damages. This test considers (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See id.* at 575. Without a determination of liability or the extent of compensatory damages before deciding punitive damages, the third prong of this test fails on its face. When a court enters a reverse punitive damages bifurcation plan, there is no way a jury can non-arbitrarily determine a proportional amount, or a multiplier as in the present case, without first knowing the extent of the alleged harm at issue. There is simply no basis for comparison because the degree and extent of civil liability are unknown.

As this Court further recognized in *Gore*, the ratio between punitive damages and the actual harm inflicted on the plaintiff "[is] perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *Id.* at 580. The Court's consistent refusal to adopt a "bright line" test for de-

termining the constitutional propriety of the ratio between punitive damages and the actual or even potential damage to the plaintiff reaffirms the need for the fact finder to determine liability and economic damages before considering punitive damages. *See id.* at 582-83. Instead of a mathematical formula, this Court has provided specific guidance to courts for evaluating the excessiveness of punitive damages that greatly exceed compensatory damages. The constitutionally permissible size of the ratio varies based on the reprehensibility of the conduct and harm to the particular individual or individuals before the court.

For instance, in ordinary cases, a punitive damage award of four times compensatory damages "may be close to the line" of constitutional permissibility. *Haslip,* 499 U.S. at 23. In some cases, the Court has suggested that low awards of compensatory damages may justify a higher ratio if the act is particularly egregious, results in a small amount of economic damages, or the monetary value of the harm is difficult to measure. *See Gore,* 517 U.S. at 582. On the other hand, a substantial compensatory award, which may itself include a punitive element, may permit no more than a 1:1 ratio between punitive and compensatory damages. *See Campbell,* 538 U.S. at 424-26.

Granting certiorari here would give the Court the opportunity to hold that these constitutional principles cannot be satisfied where a jury determines a punitive damages amount or a multiplier before knowing the economic damages incurred by the plaintiffs. A court reviewing a punitive damages award focusing on the ratio of compensatory to puni-

tive damages cannot even begin its thought process if there is no determination of compensatory damages from which to begin. Such a process makes a sham of the *Leatherman* Court's holding that the fundamentals of procedural due process have a meaningful *de novo* review and whether a lower court properly applied this Court's three prong test as to whether an award was constitutional.[2]

II. DEFENDANTS ARE UNABLE TO RECEIVE A FAIR TRIAL WHEN PUNITIVE DAMAGES ARE DETERMINED BEFORE COMPENSATORY LIABILITY AND DAMAGES

A. The Trial Court's Plan is Intended to Maximize, Rather Than Minimize, the Likelihood of Bias and Prejudice

Typically in an ordinary bifurcated trial, juries determine punitive damages issues only *after* compensatory liability and damages have been determined. This procedure prevents evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. Such evidence may include inflammatory documents or the net worth of the defendant. While juries may be instructed to ignore such evidence in determining liability, it is difficult, as a practical

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[2] This Court's decision in *Oberg* established a requirement for meaningful appellate review of punitive damages determinations. *See Oberg*, 512 U.S. at 421. The Court built on this requirement in *Leatherman*, holding that appellate *de novo* review of punitive damages awards was necessary to comport with constitutional due process. *See Leatherman*, 512 U.S. at 443.

matter, for jurors to do so. By deferring consideration of evidence relevant only to punitive damages, the standard approach to a bifurcated punitive damages trial is intended to limit the potential for bias. *See* Victor E. Schwartz *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1018-19 (1999).

This "straight bifurcation" procedure is the precise opposite of the unusual approach adopted in the trial court here. The trial court's plan is clearly intended to maximize, rather than minimize, the likelihood of bias and prejudice. It jeopardizes the due process right of Defendants-Petitioners to a fair trial.

In some complex cases, courts have even trifurcated trials – allowing the jury to first decide compensatory liability and damages, then punitive damages liability, then the amount of any punitive damages – to further reduce the potential that the jury may improperly consider irrelevant and highly prejudicial evidence. *See, e.g., Webster v. Boyett*, 496 S.E.2d 459, 462-64 (Ga. 1998).

The Supreme Court of Mississippi in *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006), explained the importance of separating presentation of liability *before* punitive damages. The court recognized, "without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages." *Id.* at 938. A trial court plan that allows a jury to consider punitive damages at the same time as compensatory liability and damages,

> is a troubling scenario when one considers that under such procedure, not only is the jury subject to possibly returning an inflated compensatory damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.

Id.

Many other courts have agreed that evidence related to punitive damages should be removed from the jury's determination of liability and compensatory damages to the "extent humanly possible" to avoid the "taint and suspicion" that would otherwise pervade the verdict. *Campolongo v. Celotex Corp.*, 681 F. Supp. 261, 264 (D. N.J. 1988) (upholding trial court plan in which jury considered strict liability and compensatory damages before negligence claims and punitive damages). Indeed, the majority rule is that the procedure approved in West Virginia is unconstitutional. *See In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-19 (5th Cir. 1998); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert. denied*, 128 S. Ct. 96 (2007); *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

Yet, in this case, the trial plan provides a form of reverse bifurcation proposed by the Plaintiffs that will maximize the potential for jury bias and an ex-

cessive award, rather than minimize it. Granting certiorari in this case provides the Court with an opportunity to consider whether this risk of prejudice rises to the level of a constitutional violation of a defendant's due process rights.

B. Reverse Bifurcation in Punitive Damages Trials May Become More Common Unless the Court Applies its Punitive Damages Jurisprudence to Such Practices

This is not the first instance of the use of such a nontraditional reverse bifurcation procedure that jeopardizes a defendant's due process rights, nor will it be the last – particularly in West Virginia.

A reverse bifurcation plan to permit consideration of punitive damages before a full determination of liability is similar to an approach that was rejected by a Florida appellate court and the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Ct. App. 2003), *aff'd*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007). *Engle* involved a class action composed of all Florida smokers seeking damages against cigarette companies and industry organizations for alleged smoking-related injuries. The initial proposed *Engle* trial plan was divided into three phases. In Phase 1, the jury was to consider general issues related to the defendants' conduct and health effects of smoking, reach findings of fact, and determine entitlement to punitive damages for the class as a whole. *See id.* at 441. This trial plan also proposed to allow the jury, after determining entitlement to punitive damages, to then establish a "basis or ratio" for computing punitive damages individually for class members within each

subclass. *See id.* at 441 n.2. In Phase 2, the jury would determine the individual liability and compensatory damages claims, and the punitive "basis or ratio" would be applied to each plaintiff's compensatory award to determine his or her punitive award. *See id.* It was not until after the jury returned its Phase 1 verdict, and before the Phase 2 trial began, that the court abandoned the "basis or ratio" method, which was repeatedly objected to by the defendants. *See id.* Instead, the court determined the jury would assess punitive damages as a lump sum with respect to the entire class.

Under the modified trial plan, the jury, in Phase 2, would consider compensatory damages to three individual class representatives and the amount of punitive damages for the entire class. Phase 3 would involve new juries that would decide individual liability and compensatory damages for the estimated 700,000 class members.[3] The result of the first two phases of the trial was a $145 *billion* punitive damage award for the class before a d termination of individual liability or compensatory damages for all but the three class representatives. *See Engle*, 853 So. 2d at 434.

The appellate court described the plan as putting the "cart before the horse." *See id.* at 450. Relying on the Florida Constitution, the court found it was impermissible to determine class-wide punitive damages before the necessary findings of liability and de-

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[3] The determination of compensatory and punitive awards was conducted in separate stages in Phase 2. *See Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).

termination of compensatory damages because such a plan:

> a) improperly requir[ed] the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) preclud[ed] the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminat[ed] the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

Id. The court also found it improper to decide punitive damages based on a fictional composite – a generalized "perfect plaintiff" – that supplanted all real class members, whose knowledge, conduct, and other circumstances varied, and that allowed the introduction of evidence of years of conduct that was "untethered to any individual plaintiff." *Id.* at 456, 467 n.48.

The Florida Supreme Court unanimously affirmed the appellate court's decision to vacate the punitive damages award. *See Engle*, 945 So. 2d. at 1262. The Florida Supreme Court held, "[a]s a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed." *Id.* A majority of the *Engle* court further concluded that the trial court erred in allowing the jury to consider entitlement to punitive damages during Phase 1 of the trial. *See id.* at 1262-63. The court

held that "a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty." *Id.* at 1262 (citing *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989)). The *Engle* court recognized that the jury's general findings on certain factual issues and elements of liability were insufficient to support a punitive damage award when the jury had not determined crucial elements of the case, such as whether any of the class members relied upon the defendants' representations or were injured by the defendants' conduct. *See id.* at 1263. In other words, the trial court erred in permitting the jury in Phase 1 to consider punitive damages when that jury "did not determine whether the defendants were liable to anyone." *Id.* at 1263 (quoting *Engle*, 853 So. 2d at 450). This Court denied certiorari. 128 S. Ct. 96 (2007).

Indeed, the issue has arisen yet again in a Petition pending before this Court. In *Philip Morris USA Inc. v. Accord*, No. 07-806 (petition filed Dec. 17, 2007), a mass tort action consolidating over 700 separate personal injury actions brought by individual smokers, a West Virginia court applied a similar reverse bifurcation procedure as in the instant case. In Phase I of that trial, the court would determine punitive damages for each individual defendant's conduct based on aggregate proof, without any nexus to an individual plaintiff. It would then set a punitive damages "multiplier" for that defendant. In Phase II, different fact finders would determine liability and compensatory damages. Then the multiplier would be applied to each plaintiff to determine the amount of punitive damages owed by each defendant to each individual plaintiff.

This type of proceeding, as in the case at bar, is rigged to punish an unpopular corporate defendant without respect to the reprehensibility of its conduct or the amount of harm to any particular plaintiff. In other words, the same multiplier will award each and every plaintiff who receives compensatory damages punitive damages, regardless of why he or she began to smoke, what he or she know about the health risks of smoking, how often he or she smoked, what brand he or she smoked, what advertising or other conduct influenced his or her behavior, and the illness he or she contracted. Such arbitrary punishment is precisely what the Due Process Clause does not permit.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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